Supreme Court, U.S.
FILED
JUN 12 1995
OFFICE OF THE CLERK

No. 94-2026

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

LOCAL 30, UNITED SLATE, TILE AND COMPOSITION ROOFERS, DAMP AND WATERPROOF WORKERS ASSOCIATION, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

RICHARD B. SIGMOND
Counsel of Record
THOMAS H. KOHN
TERENCE E. COLES
SAGOT, JENNINGS & SIGMOND
1172 Public Ledger Building
150 S. Independence Mall
Philadelphia, PA 19106-3490
(215) 922-6700
Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED

1. Did the National Labor Relations Board (hereinafter "NLRB" or "Board") abuse its discretion when it imposed a broad, class-based remedial Order, including a "class action" style back pay directive, against Local 30, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association, AFL-CIO (hereinafter "Local 30"), where the Board failed to issue a "class certification" and did not adopt procedures or guidelines sufficient to provide the respondent adequate notice and opportunity to be heard concerning the "class" issues and the potential ramifications of the Board remedy?

2. Did the Board abuse its discretion by imposing a broad, class-based back pay remedy without conducting a hearing to determine the impact of that remedy on the fiscal and organizational integrity of Local 30, where the potential financial liability that may be imposed on the labor organization could destroy the Union or significantly impair its ability to represent its members in collective bargaining?

3. Did the Board abuse its discretion when, in the absence of substantial evidence of record indicating that other individuals applied for or were denied employment through a Union hiring hall, it expanded a finding of discrimination on behalf of a single individual to include an undetermined number of additional persons, based upon pure speculation that such other persons would also have been denied employment through the hiring hall, where the record demonstrates that no other such person had applied for employment with the Union?

4. Did the Board abuse its discretion when, after expanding a charge by a single individual to include an unidentified "class" of persons without adequate notice and opportunity to be heard by respondent, it established criteria for back pay eligibility (guidelines for determin-

ing whether an individual was qualified for work) that are different than the lawful criteria established by the Union for such employment, with the result that an undetermined number of individuals may be eligible to receive back pay in circumstances where the individuals, in the absence of discrimination, could not have satisfied the lawful criteria established by the Union for employment eligibility?

5. Did the NLRB violate the respondent Union's due process rights when it issued a broad, class-based back pay award without first adopting Rules and Regulations that would provide adequate notice and opportunity to be heard concerning the "class" issues and where the Board's Order and compliance procedures do not adequately afford the Union an opportunity to contest the appropriateness of the class remedy?

LIST OF PARTIES

The parties in the United States Court of Appeals for the Third Circuit were the petitioner, Local 30, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers' Association, AFL-CIO (hereinafter "Local 30"), Tri-County Roofing, Inc. and Ace Roofing and Sheet Metal, Inc. (hereinafter "Tri-County" and/or "Ace"), who were respondents below, and the National Labor Relations Board (hereinafter "NLRB" or "Board"), petitioner below.

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PETITION FOR WRIT OF CERTIORARI

Local 30, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers' Association, AFL-CIO (hereinafter "Local 30"), respectfully prays that a Writ of Certiorari issue to review the portion of the judgment of the United States Court of Appeals for the Third Circuit entered in its Case Nos. 94-3148 and 94-3165 on February 16, 1995 dealing with the NLRB's imposition of a class-based remedy and the Board's further imposition of a broad back pay order without conducting a hearing on the destructive impact of that remedy on the Union, the appropriateness of the Order, or adopting guidelines that will permit the Union to demonstrate that the potential financial liability resulting from the Order will be repugnant to the purposes of the Act.

OPINIONS BELOW

The Decision and Order of the Court of Appeals for the Third Circuit is reported at —— F.3d —— (3d Cir. 1995) and is reprinted in the Appendix to this Petition, p. 1a, *infra,* together with the Order on the Petition for Rehearing, p. 84a, *infra.*

JURISDICTION

The United States Court of Appeals for the Third Circuit entered its judgment on February 16, 1995 (p. 1a, *infra*). The Court enforced the Decision and Order of the NLRB, which had found that Local 30 had violated the National Labor Relations Act, 29 U.S.C. § 158(b) (p. 4a, *infra*). *Tri-County Roofing,* 311 NLRB 1368 (1993). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 10(c) of the National Labor Reltaions Act, 29 U.S.C. § 160(c) (hereinafter "Act"), provides, in relevant part:

> If . . . the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board . . . shall issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.

STATEMENT OF THE CASE

In the proceedings before the NLRB, the case concerned the alleged discriminatory operation of Local 30's hiring hall. A series of unfair labor practice charges and amended charges were initiated on March 20, 1989 by David Suda (hereinafter "Suda") against two contractors in the roofing industry and Local 30, a labor organization which represents employees engaged in that industry.

Suda alleged that Local 30 violated the Act in the operation of its hiring hall. After a hearing, the Administrative Law Judge (hereinafter "ALJ") issued a Decision on May 8, 1992, finding that Local 30 engaged in unfair labor practices in violation of the Act by operating its hiring hall in a discriminatory manner. 311 NLRB 1372; p. 18a, *infra.*

The Board issued a Decision and Order on August 31, 1993, upholding the ALJ's Decision with some modifications. 311 NLRB 1368; p. 4a, *infra.* The Board imposed a Remedial Order which encompassed a class of back pay recipients who were neither named nor otherwise identified in the Complaint or during the hearing before the ALJ and whose qualifications for employment were not established in the record.

A. The Board's Findings of Fact

Two divisions, or "locals," of the United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association, AFL-CIO, are relevant to this matter: Local 30 and Local 30B. Local 30 contracted with the commercial roofing association and individual employers engaged in commercial roofing, while Local 30B contracted with the residential roofing association and individual residential contractors. 311 NLRB at 1372; p. 20a, *infra.*

Each Local negotiated separate collective bargaining agreements and maintained and operated independent hiring halls with separate sets of hiring hall rules. That separation within the Union mirrored the important distinction between the commercial roofing industry and the residential roofing industry and the distinctions among the Union members that practice their trade within each division. As the Board itself noted, residential and commercial roofers require two different types of training, skill-level and job performance. 311 NLRB at 1375; pp. 29a-30a, *infra.*

The collective bargaining agreement between Local 30 and the commercial multi-employer association, the Roofing and Sheet Metal Contractors' Association of Philadelphia and Vicinity (hereinafter "RSMCA"), provided that the Union would establish and maintain an exclusive, nondiscriminatory hiring hall. It further provided that all applicants would be "registered," so that records of an individual's application would be maintained, that only qualified, competent and experienced "journeymen" should be referred to a job, and that an employer would have the ultimate discretion to accept or reject an applicant who was referred to it.

Referrals from the Local 30 Hiring Hall were not restricted solely to members of Local 30. Individuals who were not members of Local 30 were referred for work through the Local 30 Hiring Hall, and any Local 30B member who felt that he or she was qualified for referral as a commercial journeyman would have been permitted to demonstrate their qualifications (A. 2629-31).[1] Moreover, the International Union Constitution, which governed Local 30's affairs, contained provisions by which Local 30B members could, if they so desired and were qualified, transfer to Local 30 (A. 4052-54, GCX 5 at 64-68; A. 4098-4100, GCX 5a at 62-66). With the exception of Suda, no member of Local 30B sought to be referred from the Local 30 Hiring Hall or sought transfer to Local 30. At the times relevant to this case, Local 30 required applicants to demonstrate that they had five thousand (5,000) hours of commercial roofing experience as a condition for commercial journeyman status and eligibility for referral, a standard the Board found to be lawful (p. 30a, *infra*; A. 1119-20, 2622-30).

David Suda was a residential roofer and thus a member of Local 30B. On June 29, 1989, Suda went to the Local

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[1] References to the Third Circuit Appendix are denoted as "A. ——"; "GCX" refers to General Counsel Exhibits.

30 Hiring Hall and asked to sign the commercial referral list. He was permitted to sign the referral list, but was informed that he would not be referred to work because he was not certified as a commercial journeyman. Upon reviewing the circumstances involving Suda's application for referral, the Board found that Local 30 unlawfully deprived Suda of a referral for employment. Among other findings concerning Suda, the Board determined that Suda had presented sufficient qualifications for commercial journeyman status under the Union's established five thousand (5,000) hour guideline and was, therefore, qualified for employment as a journeyman in the commercial roofing sector.[2] Having found that Suda was entitled to relief, the Board then decided to expand its Remedial Order to include a large group of individuals, estimated by General Counsel to number in the hundreds, whose qualifications for employment were never established in the record, and who, without dispute, never sought referral to commercial roofing jobs from the Union's Hiring Hall.

The Board's Order included, *inter alia,* the following directive:

> 2(f) Make David Suda and other employee-members of Local 30B and helpers whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner, and in respect to the persons, set forth in Sections XIII(C)

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[2] The Board also issued other Findings and Conclusions involving Suda, specifically relating to an allegation that the Union had caused his layoff from a commercial roofing company and a confrontation in the Hiring Hall between Suda and a Local 30 Business Agent. Since Local 30 does not seek issuance of a Writ of Certiorari concerning the Board's Findings that relate to David Suda individually, discussion of these Findings and Conclusions is not essential to this Petition. The Petition solely involves issues raised by the Board's expansion of the remedies imposed on the Union to include class-based back pay entitlement, based on pure speculation, and the potentially destructive ramifications of that Remedial Order. 311 NLRB at 1370; p. 10a, *infra.*

> and XIV(A) of the Judge's Decision and as set forth in this Decision.

311 NLRB at 1370; p. 10a, *infra.*

Section XIII(c) of the ALJ's Decision, as modified by the Board, required Local 30 to make whole for any loss of earnings and other benefits, in addition to Suda, any employee-member of Local 3OB having, at the time of the claimed loss:

> At least 5,000 hours of roofing experience and who graduated from the 30B Apprentice Program; or
>
> A total of at least 5,000 hours of roofing experience with one or more of the following companies [list of companies omitted]; or
>
> At lease 5,000 hours of commercial roofing experience.

311 NLRB at 1370-71; pp. 9a-13a, *infra.*

The criteria set forth in the Board's Order establishing eligibility for back pay by this undetermined number of individuals who never sought employment through Local 30's Hiring Hall (and who never established their qualifications as commercial journeymen) is significantly different than the standards governing eligibility for referral that were utilized by the Union Hiring Hall, standards that the Board found to be lawful (p. 30a, *infra*).

Local 30 utilized a consistent and entirely lawful standard of five thousand (5,000) hours of commercial roofing experience as a prerequisite for being recognized as a commercial journeyman roofer. In its Remedial Order, the Board, without any evidenciary support, and contrary to the established industry standard that it determined to have been lawful, announced two additional criteria for eligibility under its broad back pay remedy. These additional criteria, *i.e.* 5,000 hours of *any* roofing experience (residential or commercial) and graduation from the Local 30B Apprenticeship Program (a residential apprenticeship program) or *any* roofing experience with certain

specific companies (which perform commercial and residential roofing work), would permit individuals who had little or no commercial roofing experience to become eligible for the receipt of back pay.

The Board's opinion acknowledges that none of these criteria were ever utilized or applied by the Union or any employer in the commercial roofing industry. Nevertheless, the Board's Remedial Order contains these criteria for receipt of back pay, absent any evidenciary basis, and thus opens the door to a potentially crushing liability by Local 30 that would require payments to individuals who had never satisfied recognized guidelines for commercial journeyman status.

B. Proceedings Below

On September 27, 1993, Local 30 filed a Motion for Reconsideration of the Board's Remedial Order. On November 22, 1993, the Board denied that Motion. On March 24, 1994, the Board filed an Application for Enforcement before the United States Court of Appeals for the Third Circuit and on April 8, 1994, Local 30 filed a Petition for Review. On February 16, 1995, the Court of Appeals for the Third Circuit issued a Judgment Order, without opinion, affirming the NLRB Decision and Order, granting the Application for Enforcement, and denying the Petition for Review (p. 1a, *infra*). Local 30 filed a timely Petition for Rehearing by the panel and Suggestion for Rehearing in Banc. The Petition was denied on March 14, 1995 (p. 84a, *infra*).

REASONS FOR GRANTING THE WRIT

The Decision by the Court of Appeals for the Third Circuit erroneously upholds a Board Order that represents a serious abuse of Board discretion, is repugnant to the purposes of the Act and underscores the absence of adequate due process safeguards in the Board's consideration of class-action style cases. Although the Board has been given wide discretion in fashioning remedies, this discretion does not permit a remedial order that is devoid of any evidenciary support and is contrary to the fundamental objectives of the NLRA. The Remedial Order at issue suffers these impediments.

In addition, in determining to expand its Remedial Order to include a "class-based" back pay remedy, the Board further abused its discretion by failing to adopt rules, regulations or guidelines that would permit Local 30 an opportunity to contest the appropriateness of a "class certification," have notice and opportunity to be heard concerning the scope of the proposed class remedy, and present evidence demonstrating that the back pay remedy would financially cripple the Union's ability to effectively represent its members.

I. THE BOARD EXCEEDED ITS AUTHORITY AND ABUSED ITS DISCRETION BY ORDERING A CLASS-BASED REMEDY WITHOUT SUBSTANTIAL EVIDENCE OF DISCRIMINATION DIRECTED AGAINST INDIVIDUALS OTHER THAN DAVID SUDA AND BY CHANGING ITS ESTABLISHED GUIDELINES CONCERNING "CLASS-BASED" RELIEF WITHOUT PRIOR NOTICE TO THE PARTIES

The Board's authority to issue a Remedial Order is granted by § 10(c) of the Act, 29 U.S.C. § 160(c):

> If . . . the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board . . . shall issue . . . an order requiring such

> person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of the Act.

This Court has recognized that Congress delegated to the Board broad discretion to adapt its remedies to the needs of particular situations. "In fashioning its remedies . . . the Board calls on a fund of knowledge and expertise all its own, and its choice of remedy must, therefore, be given special respect by reviewing courts." *NLRB v. Gissel Packing Company*, 395 U.S. 575, 612, n.32 (1969).

However, the Board's remedial discretion is limited by both statutory and constitutional constraints. Thus, a Board remedy will not stand if it is "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act," *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943), or is not "tailored to the unfair labor practice it is intended to redress." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 887, 900 (1984).

Similarly, the Board's discretionary power "is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violations where those consequences are of a kind to thwart the purpose of the Act." *Consolidated Edison v. NLRB*, 305 U.S. 197, 236 (1938); *NLRB v. Strong*, 395 U.S. 357, 359 (1969) ("grant of remedial power . . . does not authorize punitive measures"); *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11-12 (1940).

The Board's class-based remedy in this case represents a serious abuse of this authority. Although the Board may arguably be empowered to impose a class action form of relief that extends to persons who are not named in either the charge or the complaint, the Board has, until now, limited such relief to a particular category of cases:

> The Board has ordered remedial relief to unnamed individuals similarly situated to discriminatees in a limited number of cases where it has found sufficient evidence to establish wide-spread discrimination against a defined and easily identified class. Common to these cases is the fact that the unnamed discriminatees could be easily identified by a single, readily ascertainable, and definitive trait, most often the absence of membership in a particular labor organization. The line for determining who is in or out of such a class is crisp and clear. *Heavy and Highway Construction Workers' Labor Union, No. 158 (Contractors' Association of Eastern Pennsylvania),* 280 NLRB 1100, 1101 (1986) (citations omitted).

In this case, there were not any unnamed individuals "similarly situated" to David Suda, the only individual who filed unfair labor practice charges. Although Suda and various other members of Local 30B shared membership status in the *residential* division of the Union, the Board did not rely on such status, alone, as a basis for back pay liability. Rather, the Board established a class predicated upon various permutations of experience. This violated the requisite for class status under Board precedent, the existence of a "single, readily ascertainable, and definitive trait."

There is a substantial lack of evidence that the Union discriminated against any person other than Suda. In situations where the record lacks substantial evidence of class-based discrimination, the Board had previously refused to enforce broad, class-based remedies. *Laborers Local 426 (Building Contractors),* 280 NLRB 610 (1986); *International Longshoremen's Ass'n., AFL-CIO (West Gulf Maritime Ass'n.),* 194 NLRB 1027 (1972). For example, in *West Gulf,* the Board was presented with an analogous evidenciary record. The Administrative Law Judge determined that the Local had operated its hiring hall in a discriminatory fashion and ordered the Local to make whole the charging parties "and all other applicants for employment . . . for any loss of pay

suffered by them by reason of [respondent's] discriminatory operation of the hiring hall. . . ." 194 NLRB at 1027. Although the Board upheld the Administrative Law Judge's determination that the Local had discriminated against the charging parties, it modified the order to cover only the charging parties and not "unknown individuals." There, the record did not reveal that any identifiable members of that Local, other than the charging parties, at any time had applied for classification cards and were denied them "or were in any other manner discriminated against in such a way as to have suffered a loss of earnings." *Id.*

As a result, the Board modified the ALJ's proposed order to cover only the charging parties and not "unknown individuals." Absent evidence of particularized discrimination, the Board determined that the remedy should not include lost earnings of unknown individuals who were not named in the complaint "and whose status as part of a group which was unlawfully deprived of work was not litigated during the course of the hearing." 194 NLRB at 1027; *see also Building Contractors*, 280 NLRB at 610, n.2 (Board refused to impose class relief, finding "[t]he record does not reveal that any identifiable non-member other than the Charging Party at any time applied for work through the hiring hall and was denied referral or was in any manner discriminated against in such a way as to have suffered a loss of earnings"); *Sheet Metal Workers Int'l. Assn., Local No. 18*, 298 NLRB 50, n.2 (1990) (NLRB refused to adopt ALJ's recommended order "insofar as it includes any other similarly situated employee member" where the "record does not reveal that any employee-member, other than [Charging Parties], had attempted to resign membership during the strike and had fines levied against them by Respondent Local").

Cases where the Courts and the Board have granted class-based relief to unnamed applicants are distinguishable from this case in that substantial evidence was introduced to establish a class of unnamed, injured dis-

criminatees based on a single, discrimination based, criterion. *United Ass'n. of Journeymen v. N.L.R.B.*, 747 F.2d 326, 332 (5th Cir. 1984) (class-based remedy legitimate where General Counsel produced evidence of discrimination, including discriminatory referral lists and testimony confirming the union-member-only restrictions of such lists); *Boilermakers Local Union No. 154, AFL-CIO (Western Pennsylvania Service Contractors' Ass'n.)*, 253 NLRB 747, 748, n.4 (1980), *enfd.*, 676 F.2d 687 (3d Cir. 1982) (grant of make-whole relief to unnamed applicants for referral, where General Counsel introduced evidence that established existence of a class of unnamed, injured discriminatees). In contrast, in this case, the Board did not justify its remedy with any substantial evidence of a class that was subjected to discrimination by the Union, including evidence that any individual, other than Suda, had applied for employment at the Union Hiring Hall and had demonstrated his/her qualifications as a commercial journeyman.

The *sine qua non* for imposing any liability beyond Suda, under established Board precedent, should have been an attempt by other Local 30B members to seek referral from Local 30, coupled with specific evidence of their qualification for such referral, neither of which were evidenced in the record before the Board. To the extent that Suda may be viewed as having applied for work through the Union's Hiring Hall, and having been denied referral, no other individual attempted to apply for such referral. Similarly, no individual other than Suda presented, or even attempted to present to the Union, any credentials which would have required the Union to certify them as commercial roofers and to refer them to commercial roofing jobs. Further distinguishing Suda from every other member of Local 30B is the fact that only Suda was identified as having requested a transfer into Local 30. Under those circumstances, applicable Board precedent required that any back pay remedy should have been limited to the sole charging party, Suda.

The Court of Appeals enforced the Board's Order and Remedy without any apparent consideration of the lack of evidence of the existence of other individuals who were discriminated against by the Union's operation of its Hiring Hall or the Board's apparent drastic alteration of its guidelines for issuing broad orders. Allowing such a decision to stand grants the Board unlimited discretionary authority, far outside the purview of the Act.

When defending against the charges by Suda before the Board, Local 30 presented substantial evidence that, notwithstanding the circumstances relating to Suda, no other individual had applied for employment through the commercial Hiring Hall or had presented his/her qualifications for commercial journeyman status to the Union as had Suda. The Board's Decision clearly determines that the alleged discrimination against Suda was not based on Suda's membership in Local 30B (the residential division), as such, but was based on the Union's refusal to refer Suda to work in the commercial sector, notwithstanding his demonstrated qualifications for employment as a commercial journeyman. In these circumstances, based upon established Board precedent, and in the absence of any other individual who had demonstrated, or even sought to demonstrate, similar qualifications to Local 30, the Union did not have any reasonable expectancy that liability would or could, be imposed by the Board on a class basis. Established and consistently applied Board precedent would seemingly have precluded any such result.

Nevertheless, the Board, in contravention of its established guidelines concerning issuance of broad orders, issued a Remedial Order that created the Board's own subjective criteria for qualification as a commercial journeyman and in the process exposed Local 30 to the potential payment of millions of dollars in back pay to individuals who may have never thought about seeking work in the commercial roofing field, may not have been qualified for such work (the Board found that the

Union's established criteria for determining commercial journeyman status—5,000 hours of commercial roofing experience—was lawful) and who may, for a variety of reasons, not have wanted to work in the rigorous, more complex and more dangerous commercial roofing sector. As a result, the Union is now confronted with an enormous potential liability, based on pure speculation by the Board, in circumstances where it could not, during the hearing, have reasonably anticipated the imposition of such an order.

In the process of expanding its Remedial Order to cover a broad "class" of unidentified individuals who may now submit back pay claims to Local 30, using criteria for eligibility other than the Union's own lawful criteria, the Board did not, in anticipation of issuing its broad order, conduct a hearing concerning the appropriateness of the new "criteria" that would determine the potential liability of the Union or in any manner provide notice to Local 30 that the Board would deviate from its established precedent so as to permit Local 30 an opportunity to present evidence at the hearing that would demonstrate, *inter alia*, that the Board's proposed remedy would not effectuate the purposes of the Act consistent with the requirements of § 10(c), 29 U.S.C. 160(c).

II. THE FAILURE BY THE NLRB TO ADOPT REASONABLE RULES OR GUIDELINES REGULATING LITIGATION BEFORE THE BOARD INVOLVING "CLASS ACTIONS" OR "BROAD CLASS-BASED RELIEF," AND THE FAILURE BY THE COURT OF APPEALS TO REVIEW THIS ISSUE, UNREASONABLY DENIED LOCAL 30 AN OPPORTUNITY TO PRESENT ITS DEFENSE AGAINST THE "CLASS" PORTION OF THE BOARD'S REMEDIAL ORDER, AND DENIED THE UNION AN OPPORTUNITY TO BE HEARD CONCERNING THE POTENTIALLY DESTRUCTIVE IMPACT OF THE BOARD'S REMEDIAL ORDER AND TO PRESENT EVIDENCE THAT THE BOARD'S ORDER, BECAUSE OF ITS IMPACT, WILL NOT EFFECTUATE THE PURPOSES OF THE ACT

The Board's Order requires that Local 30 make whole [3] any employee member of Local 30B (the Union's Residential Division) who possesses any of the Board's self-created qualifications listed in its Remedial Order (p. 10a, *infra*). That remedy simply invites submission of back pay claims by an indeterminate number of individuals who were never deprived of work, who, in the absence of discrimination, could not have been eligible for referral from the Local 30 Hiring Hall under the standards for "qualifications" adopted by Local 30 [and found to be lawful by the Board (p. 30a, *infra*)], and who never applied for referral. The Board's Remedial Order is thus punitive in nature and is repugnant to the purposes of the Act.

In a statement before the ALJ, counsel for the General Counsel represented that there may be as many as 300 individuals from the Union's residential division who

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[3] Under the Board's established guidelines, back pay is computed on the basis of separate calendar quarters or parts thereof, during the period measured from the discriminatory treatment to the date of the offer of reinstatement. *See F.W. Woolworth Company*, 90 NLRB 289, 292-293 (1950).

might now be entitled to back pay under the Board's Order (A. 2052). In its zeal to award back pay to individuals who satisfied its criteria for "qualification," the Board never considered the impact such an order would have on Local 30, nor afforded Local 30 the opportunity to demonstrate the crippling impact of that remedy on the Union and its membership. Compounding this problem, the Board's Rules and Regulations do not contain a procedure for addressing such issues.

A. The Class-Based Back Pay Remedy Is Punitive in Nature

Although it has been recognized that the Board has broad discretion in fashioning remedies for violations of the Act, the Board's remedies have only been enforced when it can fairly be said that they have, as their purpose, ends that will effectuate the purposes and policies underlying the Act. *Fibreboard Paper Products v. NLRB*, 379 U.S. 203, 216 (1964). Acknowledging the remedial purpose of the Act, this Court has held that back pay remedies must be tailored to expunge only actual, not speculative, damages. *Sure-Tan, Inc. v. NLRB*, 311 U.S. 7, 10-12 (1940) ("The Act does not prescribe penalties or fines in vindication of public rights or provide indemnity against community losses as distinguished from the protection and compensation of employees").

A Remedial Order such as that adopted by the Board in this case, one that could, in its potential, financially destroy the Union, does not effectuate the underlying purposes of the Act. Indeed, such an Order will have an opposite effect. The Act was primarily designed to promote industrial peace and stability by encouraging the practice of collective bargaining. *See Carey v. Westinghouse Electric Corporation*, 375 U.S. 261, 271 (1964); *NLRB v. Pincus Brothers*, 620 F.2d 367, 372-373 (3d Cir. 1980). A labor organization whose financial stability is uncertain, or one that is riddled with a debt of this

magnitude, can neither effectively represent its members, nor engage in meaningful collective bargaining.

An additional purpose of the Act is to promote self-organization of employees. 29 U.S.C. § 151. Indeed, the statute declares that "the policy of the United States is that of encouraging the process and procedure of collective bargaining and . . . protecting the exercise of full freedom of association, self-organization, and designation of representatives of their own choosing . . . ." *Id.*

This Court has recognized that an award of punitive damages against a union would not serve the remedial objectives of the Act. *International Brotherhood of Electrical Workers v. Foust,* 442 U.S. 42, 52 (1978) (because "the adverse consequences of punitive damages would be substantial . . . such damages may not be assessed against a union that breaches its duty of fair representation"). These primary remedial considerations were also acknowledged by the Fifth Circuit Court of Appeals in *United Association of Journeymen v. NLRB,* 747 F.2d 326 (5th Cir. 1984), which held that "any award or group of awards which have the effect of fatally crippling the union may not effectuate the purposes of the Act." The same general limitation on the Board's discretion has been acknowledged by other Courts as well. *See NLRB v. R & H Masonary Supply, Inc.,* 627 F.2d 1013, 1014 (9th Cir. 1980) (order requiring small firm to re-establish trucking operations and reinstate discharged employees judged undue burden); *Frito-Lay v. NLRB,* 585 F.2d 62, 68 (3d Cir. 1978) (order reopening plant ignored remedial purpose of Act); *Carpenter Sprinkler Corp. v. NLRB,* 605 F.2d 60, 68 (2d Cir. 1978) (award requiring restitution for strike replacements and similar restitution payments to union welfare and pension funds unnecessarily harsh).

These remedial limitations are equally applicable here, but were blatently ignored by the Board and the Third Circuit. Indeed, the considerations of undue hardship are

even more pronounced in this case. The Board's Order, if enforced, could render the Union bankrupt. Moreover, payment of the potential liability caused by the Board's Order may require the Union to impose an exorbitant assessment upon Union members by means of increased dues simply to insure its survival. The Board's Order thus contradicts its stated purpose since the individuals paying the assessment would be the same members who are the alleged *victims* of the discrimination.

This contradiction was never even considered by the Board. Such a result is tantamount to punishing the present membership of Local 30 for the alleged misconduct of a prior union leadership and will clearly impede the process of collective bargaining and the members' rights of self-organization. Indeed, the Board's Order is even more egregious in that it not only conflicts with the policies embodied in the Act, but is based upon a record devoid of any evidence that any individual applied for referral from the Local 30 Hiring Hall and was denied access solely because of membership in Local 30B.

As this Court has consistently held, a remedial order of the NLRB is only valid to the extent that it effectuates the purposes of the Act. The Board's Remedial Order in this case fails to meet that standard. By threatening the very existence of the Union, or at least its ability to function effectively, the Board's Order is punitive in nature, fails to effectuate the purposes of the Act, and, therefore, is not entitled to enforcement.

B. The Failure by the Board to Adopt Rules and Regulations That Would Have Permitted Local 30 to Enter a Defense to the Board's Class-Based, Remedial Order *Prior* to Its Entry, or to Contest The Appropriateness of the Class-Based Back Pay Order *Prior* to Its Entry, or to Have an Opportunity to Present Evidence Demonstrating That the Class Back Pay Award May Financially Destroy the Union and Thus Be Repugnant to the Purposes of the Act, Constitutes a Violation of the Board's Duty to Promulgate Reasonable Rules and Regulations That Safeguard the Due Process Rights of Litigants Appearing Before the Agency

Unlike the Federal Rules of Civil Procedure which govern the administration of litigation before the Federal Courts and which contain provisions that serve to protect the due process rights of litigants in class actions (*see* F.R.C.P. 23, 28 U.S.C.A. Rule 23), the NLRB Rules and Regulations do *not* contain any procedures for the litigation of "class actions" or the protection of litigant rights in circumstances where the Board may seek to impose broad, class-based relief.

Under the Board's Rules and Regulations, counsel for the General Counsel, in filing its complaint against the respondent, was not required to, and did not, plead any facts that would place respondent on notice that the Board would seek a broad, class-based remedy such as that issued ultimately by the Board in this case. Although counsel for the General Counsel initially stated to the ALJ that he believed several hundred other people may have been eligible for referral, counsel for the General Counsel, at most, appeared to state this contention by means of background information in support of an argument that some members may have been denied referral *solely* because of their membership in Local 30B (a position later abandoned), not in support of an allegation that a "class" of individuals existed who had applied for referral and were, each of them, qualified commercial journeymen.

Notwithstanding this statement, General Counsel was never required by the Board to submit evidence concerning other members of the alleged "class" who may have been subjected to discrimination similar to that suffered by Suda or evidence concerning the individual qualifications of any *other* person. The main argument by General Counsel in the proceedings below was that Suda, and perhaps others, were denied referral solely based upon their membership in the Local 30B residential division. The Board's decision, however, clearly determined that Union membership was never the sole criterion, or even a criterion as such. Rather, the distinguishing factor in the Union's decision not to refer certain individuals to work from the commercial Hiring Hall involved the failure by such other persons to apply for referral *and* satisfy the Union's lawful qualifications for status as a commercial journeyman. Only Suda, based on the evidence of record, arguably satisfied these standards and he received the benefit of a Board award. However, the Board improperly seized upon the Suda findings as an opportunity to announce *after* the hearing had concluded, its issuance of a broad, class-based remedy based upon newly developed (by the Board itself) criteria relating to qualification for commercial journeyman status. The Board did not reopen its hearing to entertain evidence on the appropriateness of this newly developed criteria for commercial journeyman status, nor did the Board, *prior* to the hearing, promulgate any rule or regulation that would provide the Union with notice that a "class" might be certified on the basis of newly developed criteria for qualifications or give the Union an opportunity to present traditional defenses to such a class certification or a class action generally.

This Court has firmly established that certain rules and processes in the litigation of class actions are required in order to insure fairness to all litigants and to satisfy the fundamental requirements of due process. *See, e.g., Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 163

(1974) ["In addition to meeting the four conjunctive requirements of 23(a), a class action must also qualify under the three subdivisions of 23(b)."] Similarly, this Court, and lower courts, have applied these stringent requirements to labor and employment discrimination actions. *East Tex. Motor Freight Systems, Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977) (careful attention to the requirements of Rule 23 "remains nonetheless indispensable" in Title VII class actions); *Aguinaga v. John Morrell & Co.*, 602 F. Supp. 1270, 1278 (D. Kan. 1985) (motion for class certification of union members in action for breach of duty of fair representation must meet prerequisites of Rule 23).

The Board's Rules and Regulations should be required to satisfy the same minimal, but necessary, standards for fairness if the Board intends to impose, or consider the imposition of, class action style remedies on respondents appearing before it. At no point in the hearing process did the Board announce that it would consider a "class" type remedy or require that counsel for the General Counsel submit a Petition for Class Certification, or in any manner alert Local 30 to the potential scope of the remedy it was considering, until *after* the Board's Decision was issued. The absence of a procedure to insure fairness during litigation of important "class" issues, therefore, violates fundamental concepts of due process.[4]

Nor, can the Board effectively argue that issues like the potential that the Board's remedy may financially destroy the Union may be raised during the compliance stage of the proceedings. A review of the Board's Rules and Reg-

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[4] The fundamental elements of procedural due process are notice and an opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Congress incorporated these elements of due process in the Administrative Procedure Act. To satisfy the requirements of due process, an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case. *Bendix Corp. v. FTC*, 450 F.2d 534, 542 (6th Cir. 1971).

ulations governing procedures in the compliance stage [*see, e.g.*, NLRB Rules and Regulations §§ 102.52-102.59, 29 C.F.R. §§ 102.52-102.59 (1994), p.85a, *infra*] demonstates that Local 30 will *not* be given an opportunity to present such evidence at that time. Compliance proceedings are designed to accomplish only what the name implies—namely, *compliance* with the Board's Order. The Board's Rules and Regulations do not permit a respondent to argue with any reasonable hope of receiving a fair hearing that the Board's Remedial Order is repugnant to the purposes of the Act. The ALJ in a compliance hearing has no authority to waive, mitigate or remit any portion of the Board's Order.

The Board's Order has been issued at this point in the proceedings, and the ALJ's only function, under the Board's own published guidelines, is to determine whether the respondent has *complied* with the Order. In these circumstances, at most, the ALJ's role would be to determine whether the potential scores of back pay applicants who will be attracted by the Board's Remedial Order and presumably will process claims against the Union, satisfy any of the three artificial criteria set forth in the Board's Order, and, if so, determine how much money should be awarded to each of them. *See F.W. Woolworth Co., supra,* n.2. The compliance procedures adopted by the Board, on their face, do not permit the ALJ to receive or consider evidence that the Board's announced criteria for back pay eligibility are improper or inappropriate, or to mitigate or waive damages against the Union because the financial impact of an award, in the aggregate, may interfere with the Union's ability to engage in collective bargaining and effectively represent its membership.

Thus, Local 30 has become a victim of a major gap and a glaring omission in the Board's Rules and Regulations. No procedure existed in the complaint phase of the proceeding before the Board to permit the Union to contest the "class" nature of the proposed Board remedy. In-

deed, until the Board announced its proposed class-based broad remedy, no one involved in the litigation could possibly have been familiar with the potential criteria that the Board would choose to apply to back pay claimants. At this point, instead of reopening the hearings in order to permit argument and evidence concerning the scope of its Remedial Order, and the criteria for back pay eligibility, or the issue concerning the Union's ability to pay the potential judgment, the Board issued its directive as a *fait accompli*. No opportunity to be heard concerning these issues was provided to the respondent. Nor, under the Board's published Rules and Regulations, will respondent be given an opportunity during the compliance phase to address these important issues.

The Third Circuit Court of Appeals should have determined that the procedure and process utilized by the Board in issuing its broad, class-based remedial order constituted an abuse of discretion and involved policies and practices that are not designed to effectuate the purposes of the Act. The appropriate course in a case such as this, where the Board fails to properly consider the content or the impact of its award, is denial of enforcement or, alternatively, a remand to the Board for reconsideration. *See, e.g., NLRB v. Food Store Employees,* 417 U.S. 1, 8 (1974); *NLRB v. R & H Masonry Supply,* 628 F.2d 1013, 1014 (9th Cir. 1980). However, contrary to established precedent, the Third Circuit failed to direct the NLRB to allow Local 30 the opportunity to demonstrate financial hardship or challenge the appropriateness of the class remedy either prior to imposing the remedy or at the compliance stage. That failure may result in a complete denial to the union of any opportunity to present evidence concerning mitigating factors or the impact of the Board's remedy in the compliance phase of this case. In effect, the failure to provide a forum for the evaluation of the Board's remedy is tantamount to deprivation of the Union's property without a hearing, a practice long acknowledged as infirm. *See Pergament United*

Sales, Inc. v. NLRB, 920 F.2d 130 (2nd Cir. 1990); *NLRB v. Coca Cola Bottling Co.*, 811 F.2d 82, 87 (2d Cir. 1987).

In the context of the Act, due process requires that the conduct implicated in the alleged violation by fully and fairly litigated, *see Coca Cola Bottling Co.*, 811 F.2d at 87, *NLRB v. Chelsea Laboratories, Inc.*, 825 F.2d 680, 682 (2d Cir. 1987), *cert. denied*, 484 U.S. 1026 (1988), and that adequate and reasonable Rules and Regulations be adopted by the NLRB to safeguard the rights of litigants before the agency. The Third Circuit Court of Appeals' failure to remand this matter to the Board and to instruct the Board to adopt such rules denied Local 30 the opportunity to present evidence critical to its defense of the "class" issues and thereby denied Local 30 important due process rights. Review of these important issues by the Court is required.

CONCLUSION

The reasons for granting a Writ of Certiorari in this case are substantial and involve important issues of national labor policy and potential violations of litigant due process rights by the NLRB. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

RICHARD B. SIGMOND
Counsel of Record
THOMAS H. KOHN
TERENCE E. COLES
SAGOT, JENNINGS & SIGMOND
1172 Public Ledger Building
150 S. Independence Mall
Philadelphia, PA 19106-3490
(215) 922-6700
Counsel for Petitioner

Dated: June 12, 1995

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-3148

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

TRI-COUNTY ROOFING, INC. and ACE ROOFING & SHEET METAL, INC.; LOCAL 30, UNITED SLATE, TILE AND COMPOSITION ROOFERS, DAMP AND WATERPROOF WORKERS ASSOCIATION, AFL-CIO,
Respondents

No. 94-3165

TRI-COUNTY ROOFING, INC. and ACE ROOFING & SHEET METAL, INC.; LOCAL 30, UNITED SLATE, TILE AND COMPOSITION ROOFERS, DAMP AND WATERPROOF WORKERS ASSOCIATION, AFL-CIO

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

LOCAL 30, UNITED SLATE, TILE AND COMPOSITION ROOFERS, DAMP AND WATERPROOF WORKERS ASSOCIATION, AFL-CIO,
Petitioner

On Application for Enforcement and Cross-Petition
for Review of an Order of the
National Labor Relations Board
(Board Nos. 4-CA-17967, 4-CB-5809, 4-CB-5876
& 4-CB-6038)

Submitted Pursuant to Third Circuit LAR 34.1(a)
February 3, 1995

Before: SCIRICA, ROTH and SAROKIN,
Circuit Judges

JUDGMENT ORDER

After consideration of the following contentions raised by Roofers Local 30:

1. Whether substantial evidence on the record as a whole supports the Board's finding that the Union violated Section 8(b)(1)(A) and (2) of the Act by failing to establish objective standards for referrals from the Local 30 hiring halls and by systematically denying referrals to Local 30B members;

2. Whether substantial evidence on the record as a whole supports the Board's finding that the Union violated Section 8(b)(1)(A) of the Act by subjecting Local 30B member David Suda to violence and disciplinary action when he attempted to obtain a Local 30 job referral;

3. Whether substantial evidence on the record as a whole supports the Board's finding that the Union violated Section 8(b)(1)(A) and (2) of the Act by causing

Ace/Tri-County to discharge David Suda because of his Local 30B membership; and,

4. Whether the Board abused its broad remedial discretion in fashioning a remedy for the Union's unlawful conduct, it is

ADJUDGED AND ORDERED that, substantially for the reasons set forth in the Decision and Order of the National Labor Relations Board of August 31, 1993, *Tri-County Roofing, Inc. and Ace Roofing & Sheet Metal, Inc. and David Suda, Local 30, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association, AFL-CIO and David Suda*, Cases 4-CA-17967, 4-CB-5809, 4-CB-5876 and 4-CB-6038, the Petition for Review of Roofers Local 30 is DENIED and the Application for Enforcement filed by the National Labor Relations Board is GRANTED. Costs taxed in favor of the Board.

BY THE COURT,

/s/ [Illegible]
Circuit Judge

Attest:

/s/ P. Douglas Sisk
P. DOUGLAS SISK
Clerk

Dated: February 16, 1995

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Cases 4-CA-17967, 4-CB-5809, 4-CB-5876,
and 4-CB-6038

TRI-COUNTY ROOFING, INC. and ACE ROOFING & SHEET METAL, INC. and DAVID SUDA

LOCAL 30, UNITED SLATE, TILE and COMPOSITION ROOFERS, DAMP AND WATERPROOF WORKERS ASSOCIATION, AFL-CIO and DAVID SUDA,

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DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On May 8, 1992, Administrative Law Judge Stephen J. Gross issued the attached decision. The Respondent Union and the Respondent Employer each filed exceptions and supporting briefs. The General Counsel filed a brief in support of the judge's decision, cross-exceptions and a supporting brief, and an answering brief to the Respondent's exceptions. The Respondent Union filed a brief in opposition to the General Counsel's cross-exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.

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[1] The Respondent Union and the Respondent Employer have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolution unless the clear preponderance of all the

1. As part of his recommended remedy for the Respondent Union's unlawful hiring hall practices, the judge recommended that the Local 30 and Local 30B hiring halls be operated in a nondiscriminatory manner based on written objective criteria and standards. We agree. To that end we will order that the Respondent Union select and refer qualified applicants for employment without discrimination against the applicants by reason of membership or nonmembership in the Union or any of its components or Locals, or on the basis of union activity. In addition, we will order that any and all membership distinctions in referrals to roofing employment within the jurisdiction of Locals 30 and 30B be prohibited: membership in one division, section, or part of the Union shall not be a bar to employment in any division, section, or part of the Union or industry.

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relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent Union has excepted to the judge's use of the term "apprentice program" to describe the Local 30B training program. We find merit to the Respondent Union's exception, but this does not change the result in this case. Although the Local 30B training program (as we shall term the "apprentice program") was not as rigorous as the Local 30 apprentice program, it nonetheless was still a formal, several-years-long school program aimed at providing commercial training and experience to Local 30B members. This training and the 5000 hours of roofing experience as set out by the judge are suitable criteria for qualification for Local 30 referrals and backpay.

The judge inadvertently refers to "Rise Roofing" in the backpay portion of his decision rather than "Rys Roofing."

We also acknowledge the existence of and our review of the civil RICO case involving Local 30. *U.S. v. Roofers Local 30*, 686 F.Supp. 1139 (E.D.Pa.1988), affd. 871 F.2d 401 (3d Cir. 1989), cert. denied 110 S.Ct. 363 (1989). We find that the RICO case and the decision of Judge Louis Bechtle do not preclude our decision here but in fact bolster the need for our Order and notice.

The judge also recommended that the work-referral lists of Local 30 and Local 30B under contracts with Roofing and Sheet Metal Contractors Association of Philadelphia & Vicinity, and Roofing, Metal and Heating Associates, Inc. be merged and only one list be maintained for all applicants seeking referral. We do not adopt the judge's merger recommendation. As the judge himself observed, "the maintenance of a system providing for two distinct rates of remuneration . . . has served useful purposes." Since the same objective sought by the merger, i.e., the nondiscriminatory referral of qualified individuals, can be accomplished without a remedy so intrusive as that of ordering a merger of the lists we will not require such a merger here. We also note that the judge who heard and decided the RICO case (see fn. 1, supra), which was based in large part on the same evidence before us, did not order a merger of the hiring hall lists.

2. The General Counsel has excepted to the judge's failure to include in the proposed class of individuals potentially entitled to backpay those individuals who worked under the Local 30B/RMHA contract and paid "field" dues but who did not become full members of Local 30B ("helpers"). The judge held that the record did not prove that the Local 30B helpers would have been "entitled" to seek job referrals from the Local 30 hiring hall even had the Respondent Union not discriminated against its Local 30B members.[2] The General Counsel excepts that the only proper test is whether the helpers were qualified for referral. According to the General Counsel, if a helper could meet the requirements set out by the judge for referral to Local 30 jobs, then the helper should not be categorically excluded because he or she was not a journeyman or not a member of Local 30B. As noted by the General Counsel, the helpers are encompassed within the complaint allegations as those persons denied referrals because of their "membership

[2] We do not understand the judge to have made a definitive finding that all helpers were unqualified for commercial work.

status." According to the General Counsel's argument, the helpers are analogous to the Local 30B members in that both have been denied referrals because of their lack of membership in Local 30. We find merit to the General Counsel's exception. Accordingly, if, at the compliance phase of this proceeding, it is determined that a helper meets the criteria for referral to commercial roofing work set forth by the judge, then that individual is part of the class entitled to backpay. The Order and Notice have been modified accordingly.

3. The General Counsel has also excepted to the judge's failure to order that the newly promulgated formal hiring hall criteria and standards be mailed to members of Local 30 in addition to Local 30B members. We find merit to the General Counsel's exception. In ordering the mailing to Local 30B members, the judge stated that he was concerned that the Union's hiring hall discrimination against its Local 30B members had "become so institutionalized that special steps were needed to make it clear to those members that things had changed." We also think it necessary to apprise the Local 30 members individually of the changes in the long-established hiring hall policies in order to minimize any future problems. Accordingly, to alleviate any potential misunderstanding among members of Local 30 and Local 30B about the new hiring hall rules, and in the interest of full notice and disclosure, we will order that our Notice to Members, which includes the new hiring hall criteria and standards, be mailed to all members of Local 30 and Local 30B.

4. The Respondent Employer excepts to the judge's determination that it is jointly and severally liable with the Respondent Union for its unlawful termination of employee David Suda. The general rule is that an employer and union are jointly and severally liable for backpay where the employer and the union have violated Section 8(a)(3) and (1) and Section 8(b)(1)(A) and (2) of the Act, respectively. *International Harvester Co.*, 270 NLRB 1342 (1984); *Acme Mattress Co.*, 91 NLRB 1010

(1950), enfd. 192 F.2d 524 (7th Cir. 1951). Despite this, the Respondent Employer, citing *Roofing, Metal & Heating Associates*, 304 NLRB 155 (1991), contends that at most it should be held only secondarily liable, with the Respondent Union being held primarily liable. We do not agree and find *Roofing, Metal & Heating Associates* distinguishable. *Roofing, Metal & Heating Associates* was an unusual case because the employer (the Fund and the RMHA) had turned de facto control of the hiring and retention of its training instructors over to the union. The union then ordered the discharge of an instructor because the instructor was going to seek the union business manager's job. The employer expressed displeasure at the union's directive and only reluctantly acceded to the union's demand. As a result, the union was found primarily liable, the employer secondarily.

That is a far different situation from the present case. Here, the Respondent Union did not control the Respondent Employer's hiring or retention of employees. The Respondent Union did not contact or apply direct pressure to the Respondent Employer regarding Suda's discharge. Instead the Respondent Employer, based on Suda's advising it of the Respondent Union's trial board action, discharged Suda. As found by the judge, the Respondent Employer terminated Suda in order to avoid a perceived conflict with the Union and it knew, or had reason to know, that the Respondent Union's demand that Suda leave its employ did not have a legitimate basis. The Respondent Employer had other options but it, nevertheless, chose to lay off Suda. Under these circumstances, the Respondent Employer is clearly as culpable as the Respondent Union and thus is jointly and severally liable with the Respondent Union. *Wolf Trap Foundation*, 287 NLRB 1040 (1988).

ORDER

The National Labor Relations Board orders that the Respondent Local 30, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association,

AFL-CIO, Philadelphia, Pennsylvania, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Informing employee-members of Local 30B that, because they are members of the Local 30B side of the Union, they are not permitted to seek job referrals from any of the Union's exclusive hiring halls.

(b) Discriminatorily failing to refer any employee-member of Local 30B to jobs available through the Union's exclusive hiring halls.

(c) Assaulting any employee-member of Local 30B because the employee is seeking a job referral from a hiring hall operated by the Union.

(d) Imposing a fine on any employee-member of Local 30B in circumstances in which the imposition of such fine coerces and restrains the member in respect to seeking job referrals through exclusive hiring halls operated by the Union.

(e) Causing the termination of the employment of any employee-member of Local 30B with any employer because that employee-member is not a member of the Local 30 side of the Union.

(f) Unless its exclusive hiring halls are being operated nondiscriminatorily in respect to employee-members of Local 30B, causing the termination of any such member by any employer because the member obtained employment other than through a hiring hall operated by the Union.

(g) In any other manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Maintain and operate its exclusive hiring halls in a nondiscriminatory manner based on written objective criteria and standards.

(b) Post the criteria and standards required in paragraph (a) in all exclusive hiring halls operated by the Union and mail a copy of the criteria and standards to every employee-member of Local 30 and Local 30B.

(c) Provide copies of the criteria and standards required in paragraph (a) to the Regional Director and to the chief court liaison officer appointed pursuant to the decree of the United States District Court for the Eastern District of Pennsylvania in Civil Action No. 87-7718.

(d) Select and refer applicants for employment without discrimination against the applicants by reason of membership or nonmembership in the Union or any of its components or Locals, or on the basis of union activity. Any and all distinctions in referrals to roofing employment within the jurisdiction of Locals 30 and 30B based on divisional membership are prohibited. Membership in one division, section, or part of the Union may not be a bar to employment in any division, section, or part of the Union or industry.

(e) Place hiring referral lists in conspicuous places within the exclusive hiring halls operated by the Union so as to provide for easy access and inspection by all applicants seeking job referrals.

(f) Make David Suda and other employee-members of Local 30B and helpers whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner, and in respect to the persons, set forth in section XIII(C) and XIV(A) of the judge's decision and as set forth in this decision.

(g) Maintain, for 2 years, written records of its referrals from every hiring hall operated by the Union, including information sufficient to disclose the basis of each referral, and make the records available to the Regional

Director and to the chief court liaison officer for examination and copying upon the request of either.

(h) Submit quarterly reports to the Regional Director, with copies to the chief court liaison officer, concerning referrals of employee-members of Local 30B and helpers to employers that are members of the Roofing and Sheet Metal Contractors Association of Philadelphia & Vicinity in the manner set forth in section XIII(B) of the judge's decision.

(i) Preserve and, on request, make available to the Board or its agents for examination and copying, all hiring hall records, membership lists, and all other records necessary to determine the amounts due under the terms of this Order.

(j) Post in each of its hiring halls copies of the attached notice marked "Appendix A."[3] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Union's representative, shall be posted by the Union immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Union to ensure that the notices are not altered, defaced, or covered by any other material.

(k) Mail a copy of Appendix A to every member of Local 30B and Local 30.

(l) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

B. The National Labor Relations Board orders that the Respondents Ace Roofing & Sheet Metal, Inc. and

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Tri-County Roofing, Inc., Philadelphia, Pennsylvania, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating the employment of any employee-member of the Local 30B side of Local 30, United Slate, Tile, and Composition Roofers, Damp and Waterproof Workers Association, AFL-CIO, because of a demand by Local 30 that the employee leave such employment, in circumstances in which the Respondents Ace and Tri-County know, or have reason to know, that the demand has no legitimate basis.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer David Suda immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and, jointly and severally with Local 30, make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in section XIV(A) of the judge's decision.

(b) Remove from its files any reference to the unlawful termination of Suda's employment and notify Suda that this has been done and that the termination will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facilities copies of the attached notice marked "Appendix B."[4] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the representatives of Ace and Tri-County, shall be posted by Ace and Tri-County immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

Dated, Washington, D.C. August 31, 1993

JAMES M. STEPHENS, Chairman

DENNIS M. DEVANEY, Member

JOHN NEIL RAUDABAUGH, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this Notice.

WE WILL NOT tell members of the Local 30B side of our Union that they are not permitted to seek job referrals from any exclusive hiring hall that we operate.

WE WILL NOT discriminatorily keep any member of Local 30B from using any exclusive hiring hall that we operate.

WE WILL NOT assault any member of Local 30B because the member is seeking a job referral from a hiring hall that we operate.

WE WILL NOT impose fines on members of Local 30B in circumstances in which the imposition of the fines coerces and restrains such members in respect to seeking job referrals through exclusive hiring halls that we operate.

WE WILL NOT force any member of Local 30B to leave a job because that member is not a member of Local 30. Unless we are operating the Local 30 hiring halls in a way that does not discriminate against Local 30B members, WE WILL NOT force any member of Local 30B to leave a job because that member got the job without going through one of our hiring halls.

WE WILL NOT in any other manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL maintain and operate our Local 30 hiring halls in a nondiscriminatory manner based on written objective criteria and standards.

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[4] See fn. 3.

WE WILL post these criteria and standards in all Local 30 and Local 30B hiring halls and mail a copy of such criteria and standards to every employee-member of Local 30 and Local 30B.

WE WILL select and refer applicants for employment without discrimination against those applicants by reason of membership or nonmembership in the Union or any of its components or Locals, or on the basis of union activity. Any and all distinctions in referrals to roofing employment within the jurisdiction of Locals 30 and 30B based on divisional membership are prohibited. Membership in one division, section, or part of the Union is not a bar to employment in any division, section, or part of the Union or industry.

WE WILL place hiring hall referral lists in conspicuous places within the Local 30 and Local 30B hiring halls for easy access and inspection by all applicants seeking job referrals.

WE WILL make David Suda and the following other members of Local 30B and helpers whole for any loss of earnings and other benefits, with interest, that they may have suffered since September 20, 1988, as a result of the discriminatory way we operated the Local 30 hiring halls—

> Any member of Local 30B or any helper having, at the time of the claimed loss:
>
> At least 5000 hours of roofing experience and who graduated from the Local 30B training program; or
>
> A total of at least 5000 hours of roofing experience with one or more of the following companies:
>
> Delta Roofing
> McGarvey & Sons
> McMullen Roofing
> Reilley Roofing
> R. J. Associates

Rys Roofing Company
U.S. Roofing/J.M. Contractors
Wolfe Roofing & Sheetmetal, Inc.
Any member of the RSMCA

Any other employer that does mostly commercial roofing work; or

At least 5000 hours of commercial roofing experience.

WE WILL, jointly and severally with Ace Roofing & Sheet Metal, Inc. and Tri-County Roofing, Inc., make David Suda whole, with interest, for any loss of earnings and other benefits that he suffered as a result of the termination of employment.

WE WILL maintain written records of referrals from all of our hiring halls for 2 years, with those records containing information sufficient to disclose the basis of each referral.

WE WILL submit quarterly reports to the Regional Director and to the chief court liaison officer concerning referrals of employee-members of Local 30B and helpers to employers that are members of the Roofing and Sheet Metal Contractors Association of Philadelphia & Vicinity.

LOCAL 30, UNITED SLATE, TILE AND COMPOSITION ROOFERS, DAMP AND WATERPROOF WORKERS ASSOCIATION, AFL-CIO

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT terminate the employment of any member of Local 30B, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association, AFL-CIO, because of a demand by Local 30 that the employee leave such employ, in circumstances in which we know, or have reason to know, that such demand lacks a legitimate basis.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer David Suda immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enioyed and, WE WILL jointly and severally with Local 30, make him whole, with interest, for any loss of earnings and other benefits suffered as a result of our discrimination against him.

WE WILL remove from our files any reference to the unlawful termination of David Suda and WE WILL notify Suda that this has been done and that the termination will not be used against him in any way.

ACE ROOFING & SHEET METAL, INC.

TRI-COUNTY ROOFING, INC.

JD—130—92
Philadelphia, PA

UNITED STATES OF AMERICA BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Case 4—CA—17967

TRI-COUNTY ROOFING, INC. and
ACE ROOFING & SHEET METAL, INC.

and

DAVID SUDA, an Individual

Cases 4—CB—5809
4—CB—5876
4—CB—6038

LOCAL 30, UNITED SLATE, TILE AND COMPOSITION ROOFERS, DAMP AND WATERPROOF WORKERS ASSOCIATION, AFL-CIO (ROOFING AND SHEET METAL CONTRACTORS ASSOCIATION OF PHILADELPHIA & VICINITY, AND ROOFING, METAL AND HEATING ASSOCIATES, INC.)

and

DAVID SUDA, an Individual

DECISION

Statement of the Case

STEPHEN J. GROSS, Administrative Law Judge. The General Counsel's allegations concerning the Respondent union center around what the General Counsel contends is the unlawful way the union operates its hiring halls. As for Ace Roofing and Tri-County, the General Counsel alleges that they are alter egos of one another, that the union unlawfully demanded that an employee of Ace/Tri-County, David Suda, leave the employ of that company, and that Ace/Tri-County, in response, unlawfully fired Suda.

This proceeding began with unfair labor practice charges filed by David Suda on March 20, 1989. Suda thereafter filed additional charges and amended charges. On January 23, 1991, a consolidated complaint issued in cases 4—CB—5809 and 5876. Then on February 28 another consolidated complaint issued, in cases 4—CB—5809, 5876 and 6308 and in 4—CA—17967. The Respondent union, Ace and Tri-County admit that the Board has jurisdiction over this matter, that the Respondent union is a labor organization, and that Ace and Tri-County are employers engaged in commerce. Ace and Tri-County further admit that they are alter egos of one another. But the Respondents deny that they have violated the National Labor Relations Act (the Act) in any respect.

The case went to hearing in Philadelphia on various dates between April and September, 1991. The General Counsel and the Respondent union have filed briefs as have, jointly, Ace and Tri-County. The case stands ready for decision.

For the reasons I discuss below, my conclusion is that the facts of record prove that the Respondents violated the Act in the ways and to the extent alleged by the General Counsel.

I. Introduction

A. Local 30 and Local 30B

An initial peculiarity is that we must first sort out whether we are dealing with two unions, or just with one.

In 1968, at a time when the entity Local 30 was already in existence, the Roofers Union International granted a charter to "Local 30-B." Since then employees interested in joining a roofers union in the Local 30/30B jurisdictional area (which is centered in Philadelphia [1]) must choose between Local 30 and Local 30B. There is one membership roll for Local 30 (with about 1,200 members) and another for 30B (between 300 and 400 members).[2] Dues are different. Moreover various employers, including one employers' association, have entered into collective-bargaining agreements with "Local 30-B" while, contemporaneously, another employers' association and other employers have contracted with "Local 30." And employers that have contracts with Local 30B make fringe benefit payments into funds different from the funds that the Local 30 employers pay into.

On the other hand: (1) there is just one set of officers for Local 30 and 30B; (2) those officers are elected in combined Local 30/30B elections (the ballots of the 30B members are counted together with those of the Local 30 members to get one combined total); (3) one executive board governs Local 30 and 30B; (4) there is just one constitution and one set of bylaws for Local 30 and 30B; (5) the Local 30 and 30B business agents are the same,

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[1] That area includes Reading and Allentown, Pennsylvania; Wilmington and New Castle, Delaware; Atlantic City and Cape May, New Jersey; and surrounding counties.

[2] Numerous employees who are not members of Local 30B nonetheless have "field dues" deducted from their pay while they engage in work within the jurisdiction of Local 30B for employers who have a contractual relationship with Local 30B.

so that any one business agent is likely to handle both Local 30 and Local 30B matters; (6) Local 30 and 30B file one financial statement (LM-2) with the Department of Labor; (7) Local 30 and 30B have one set of hiring hall rules (labeled "30/30B"); and (8) the Union's trial boards (designated "Local 30/30B" trial boards) have jurisdiction over the members of both Local 30 and Local 30B.

I conclude that, for the purposes of the Act, Locals 30 and 30B constitute one labor organization.

Throughout the remainder of this decision: the terms "Union" and "Local 30/30B" means the Respondent union—the combined Locals 30 and 30B. "Local 30" refers to that one "side" of the Union (in the members' terminology) and "Local 30B," or just "30B," refers to the other side.

B. The Union's Hiring Halls

The Union's main hiring halls are in Philadelphia. But the Union operates hiring halls in various other cities and towns within the Union's geographic jurisdiction, such as in Trenton, New Jersey, and in Kutztown, Pennsylvania.

The Union treats each of its hiring halls as though it is two halls, one for use by the Union's Local 30 members, and one for its 30B members. In Philadelphia, in fact, the Union does operate one hiring hall for its Local 30 members and a physically distinct hiring hall for its 30B members.

All of the hiring halls used by the Union's Local 30 members are exclusive hiring halls by virtue of the collective-bargaining agreement between the Union and an association of employers called the Roofing & Sheet Metal Contractors Association of Philadelphia and Vicinity ("RSMCA"). That is, the employer members of the RSMCA are obligated by their agreement with the Union to hire roofing employees only through the hiring halls

operated by the Local 30 side of the Union, and the Union forbids its members (whether 30 or 30B) to attempt to obtain employment with RSMCA members except through the Local 30 hiring halls.

That the Local 30 hiring halls are exclusive hiring halls is clear not only from the Union's agreement with the RSMCA agreement, but also from: the Union's hiring hall rules; a trial board decision that is part of the record in this proceeding; and the testimony of various witnesses.

As for the 30B halls, for many years until November 1989 the Union was a party to collective-bargaining agreements with another group of employers, the Roofing, Metal & Heating Associates ("RMHA"), which collective-bargaining agreements also provided for the operation by the Union of exclusive hiring halls. The name the Union went by when executing those agreements with the RMHA was the "Residential Reroofing Union, Local 30B."

Notwithstanding contract language and hiring hall rules by which the 30B halls were purportedly exclusive hiring halls, employees routinely sought employment with members of the RMHA by applying directly with such employers, and members fo the RMHA routinely hired employees without using the 30B hiring halls. But nothing in this proceeding turns on the Union's 30B halls being exclusive hiring halls.

What is relevant about the 30B halls is that the pay scale of jobs obtainable via the 30B halls is, and always has been, substantially lower than the pay scale of jobs obtainable through the Local 30 halls. (For example, as of January 1987, 30B journeyman wages were $14.25 per hour, while Local 30 wages were $20.27—more than 40 percent higher.[3])

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[3] These figures exclude fringe benefits. Local 30's fringe benefits are comparably higher than 30B's.

II. The Union's Policy Of Refusing To Refer 30B Employees to Local 30 Jobs

It is the Union's policy that Local 30B members may not seek employment through the Local 30 side of its hiring halls. Union officers were notably straight-forward about this in their testimony.

Consider, for example, this exchange between counsel for the General Counsel and Union vice-president Jack Conway:

> Q. It is true, is it not, to your knowledge, that . . . Local 30B members have never been referred out of the Local 30 hiring hall?
>
> A. Not to my knowledge, never. * * *
>
> Q. To your knowledge, then, from March 1968 [when 30B came into existence], members of Local 30B have not been referred out [of] Local 30 hiring halls?
>
> A. Never to my knowledge. * * *
>
> Q. As a general matter, Mr. Conway, it is true, is it not, that people using the 30B side of the hiring hall know that they are not supposed to use the Local 30 side of the hiring hall?
>
> A. Yes.

Further, the record is clear that the Union's sole basis for refusing to let 30B members use the Local 30 hiring halls is their membership in 30B rather than Local 30. The Union treats as beside the point the 30B members' qualifications for the kinds of jobs available through the Local 30 hiring halls. No matter how well qualified, 30B members are not permitted to seek work through the Local 30 halls. In fact, there is no mechanism by which 30B members may demonstrate thier qualifications for Local 30 work. (Some of the evidence in these regards will be further considered in Parts IV and IX, infra.)

Lack of membership in a favored union is not an appropriate basis for refusing access to an exclusive hiring

hall. Rather, a union's operation of an exclusive hiring hall in that manner violates Section 8(b)(1)(A) and (2) of the Act. E.g., *Teamsters Local 293 (Beverages Distributors)*, 302 NLRB No. 66 (Mar. 29, 1991); *Teamsters Local 519 (Rust Engineering)*, 276 NLRB 898 (1985); *Plumbers Local 198 (Jacobs/Wiese)*, 268 NLRB 1312 (1984); see *Breininger v. Sheet Metal Workers Int'l*, 110 S. Ct. 424, 437 (1989); *Teamsters Local 357 v. NLRB*, 365 U.S. 667 (1961).

Nor may a Union operate a hiring hall in a way that favors one faction of its members over another. Again, such behavior constitutes a violation of 8(b)(1)(A) and (2). *Teamsters Local 293*, supra; *Toledo World Terminals*, 289 NLRB 670 (1988).

The General Counsel's prima facie case thus is obvious. Indeed, the Union's message to the 30B members that they are not permitted to use the Local 30 hiring halls is in itself a violation of Section 8(b)(1)(A). *International Longshoreman Association, Local 1423 (Savannah Maritime Association)*, 306 NLRB No. 191 (Mar. 30, 1992); *Q.V.L. Construction*, 260 NLRB 1096 (1982).

As its defense to the General Counsel's contention that the Union has prevented 30B members from using the Local 30 halls, the Union relies chiefly on the argument that most of the 30B members are not qualified for the kinds of jobs available through the Local 30 hiring halls.

But this is not a mixed-motive case. As just indicated, membership in Local 30B has been the sole reason that the Union will not refer 30B members to jobs out of the Local 30 halls. That being so, the Union violates the Act any time it refuses a 30B member access to Local 30 job referrals, even if the 30B member is not qualified for Local 30-type jobs. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. den. 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Moreover, the Union agrees that some 30B members are qualified for the kinds of jobs obtainable via the Local 30 hiring halls. Here is vice-president Conway again:

> Q. You don't think 30B men are qualified to do Local 30 work?
>
> A. Some might be. I would say a few are.

And throughout the hearing, and on brief, the Union's counsel made the same point: some small percentage of 30B members are qualified for the jobs available through the Local 30 hiring halls.

Let us assume, therefore, that the Union could lawfully deny 30B members access to the Local 30 halls if no member of 30B were qualified for Local 30 work—notwithstanding the fact that the qualifications of the 30B members are not the reason for the Union's denials of access. Even then, and based entirely on undisputed facts, the Union's refusal to permit 30B members, as a class, to use the Local 30 halls would constitute a violation of the Act. The Union, after all, points to no theory that would permit it to refuse all 30B members access to the Local 30 halls on the ground that most of the 30B members are not qualified for Local 30 work.

For purposes of determining whether the Union violated the Act, that is to say, it matters not at all how large a proportion of the 30B membership is qualified to perform the kinds of work available through Local 30 halls or, indeed, whether any 30B members are qualified for that work. As will be discussed in later in this decision, however, the nature of the remedy to be ordered arguably hinges on the extent to which 30B members are qualified for commercial work. In the following part of this decision, therefore, I consider the job requirements of the journeyman commercial roofer, the qualifications of the 30B members, and how the 30B members' qualifications stack up against the qualifications of the members of Local 30.

III. To What Extent Are 30B Members Qualified For The Kinds Of Jobs Available Out Of The Union's Local 30 Hiring Halls

A. Commercial Roofing Work

As touched on earlier, the Local 30 hiring halls are exclusive hiring halls by reason of Local 30's collective-bargaining agreements with the RSMCA. For the purposes of this proceeding we can assume that the business of the RSMCA's members is entirely the installation of flat commercial roofs and, to a much lesser extent, waterproofing.

Some of these terms require definition:

> "Commercial" roof: Any roof other than a "residential" roof. A residential roof is a roof on a single family home. A commercial roof is a roof on virtually any other kind of building—factory, store, multi-family apartment house or condominium, office building, church, school, warehouse, and so on.
>
> "Flat" roof: Any roof that is relatively horizontal. (Technically, any roof "with a vertical rise or fall of less than three inches per horizontal run of one foot." [4])
>
> "Waterproofing": Anything, apart from roofing, having to do with the watertight integrity of a building. The floors of bathrooms, for example, or the below-grade walls of a building may require waterproofing.

Many hundreds of pages of the transcript and exhibits in this proceeding are devoted to describing commercial roofs and the tasks involved in installing them. But for the purposes of this decision all that need be said is this:

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[4] Per Union witness Donnarumma.

Installing commercial roofs is difficult, exacting work because, among other things: (1) a commercial roof can cover acres of surface, sloping in different directions toward many different drains and with many projections (vents, stacks, air conditioning equipment, etc.) to account for—yet, like any roof, even the tiniest error in its installation is likely to result in a leak; (2) roofs many stories above the ground, as commercial roofs often are, sometime require special techniques for bringing equipment and materials to the roof and removing discarded materials from the roof; and (3) the purchasers of commercial roofs inevitably demand multi-year warranties from the manufacturer of the roofing material (Carlisle, Firestone, Johns Manville, or Owens-Corning, for example). To protect itself, the roofing manufacturer, in turn, requires that the roofing contractor (that is, the employer to whom the Union's hiring halls refer employees) wholly comply with vast numbers of installation specifications, and the manufacturer often inspects the roof meticulously to insure that every one of those specifications has been met.

Adding to the complications of commercial roof work is the fact that there are several broad categories of roofing material, each of which requires very different installation techniques. (For example one category—"built-up" roofing—calls for putting down layers of hot asphalt; another uses a single ply of unheated rubber-like material.) Expertise associated with one category does not necessarily mean expertise with another category. Beyond that, within any given category there are numerous variations. Yet many commercial roofing contractors hold themselves out as able to install virtually any type of roof the customer chooses.

Ideally, a journeyman commercial roofer ought to be an expert at all of the many tasks associated with installing each of the various types of commercial roofs. That

includes expertise in operating all of the various types of machinery needed to install a commercial roof.

Ideally speaking, again, a journeyman commercial roofer also ought to be expert at the somewhat different tasks involved in waterproofing.

Finally, a journeyman commercial roofer should be able to work fast without allowing the need for speed to reduce the quality of his work.

It takes a typical worker anywhere from four to six years of experience working on commercial roofs to become a fully qualified journeyman commercial roofer. Schooling—as in apprenticeship training—helps, but is not necessary.

B. Residential Roofing Work

The employers' association with which Local 30B contracted, it may be recalled, is the RMHA. (The RMHA is not to be confused with the RSMCA, which is the employer association that contracts with Local 30.) To the extent that RMHA members use hiring halls to obtain employees, they use the 30B halls. Many of the RMHA members do only residential roofing, not commercial roofing. Accordingly, some of Local 30B's members are experienced only, or primarily, in residential roofing work. (What the record tells us about how many of the 30B members are qualified for commercial roofing work, and how many only for residential work, will be considered in subpart D, infra.)

Residential roof work involves both shingling (on steeply sloping roofs) and flat roof work although, in the geographic area over which the Union has jurisdiction, most residences have flat roofs.

Residential flat roof work requires less skill than does commercial work. For one thing, many fewer types of roofing materials are used on residential roofs than on

commercial roofs. Second, for a variety of reasons residential roofs are inherently less complicated to install than are commercial roofs. Third, the equipment used on residential roofs tends to be easier to learn how to operate than the equipment used in installing commercial roofs. Fourth, manufacturers of roofing material generally do not give warranties covering residential roofs. Thus residential roofing contractors do not have to concern themselves with manufacturers' inspections and the related need to comply with every one of a manufacturer's sometimes idiosyncratic installation specifications.

Additionally some not inconsequential number of residential roofing contractors, knowing that their customers are likely to be unsophisticated in roofing matters, keep their costs low by cutting every corner imaginable. Roofers working for such companies gain little experience useful for commercial work.

C. The Qualifications of Local 30's Members

With the exception of those few apprentices who choose to become members of the Union, the Union deems all of its Local 30 members to be journeyman commercial roofers. But in respect to most Local 30 members, the record tells us very little about what standards the Union applied in determining that they had journeyman qualifications and thus were acceptable as members.

Some Local 30 members attained that status via Local 30's apprenticeship program. I will asume that all of the roofers who followed this route are in fact fully qualified journeyman commercial roofers. But only a small percentage of Local 30's 1,200 members are in that category.

In December 1988 the Union began applying a standard whereby a roofer must have 5,000 hours of commercial roofing experience in order to be admitted to

Local 30 membership.[5] But relatively few of the current members of Local 30 have become members since December 1988.

At least some Local 30 journeymen attained their journeyman status this way: The roofer worked for one or more RSMCA members as a helper; then, after some period of years, one of the roofer's supervisors proposed to the Union that the roofer be designated a journeyman. But the record is silent about how many of the Local 30 journeymen attained that status way. And the record is similarly silent about how the Union decided whether to accept a given supervisor's recommendation that a roofer be accepted as a journeyman.

Some members of Local 30 obtained their membership even though they had no roofing skills or experience whatever. As one long-time member of Local 30 testified: "There's guys in Local 30 that came right out of the door and started getting . . . journeyman's money that never had a day's lick of roofing." That testimony is undenied.[6]

Did any of the members of Local 30 qualify under some other set of criteria? The record doesn't say. In fact the Union's president testified that, apart from the apprenticeship route and the 5,000-hour standard, "I don't know what happened, really," in respect to how roofers became Local 30 journeymen.

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[5] The evidence about the 5,000-hour standard is shaky. In fact it is susceptible to the conclusion that the standard is a fraudulent, after-the-fact, fabrication. At best: (1) the Union's executive board adopted the 5,000-hour standard with the expectation that it would not be implemented until approved by the Union's membership; (2) the membership was never given an opportunity to vote on it; and (3) the Union's leadership implemented the standard anyway. As indicated above, I have decided to proceed on the basis of the interpretation most favorable to the Union.

[6] The testimony was by witness Michael Sullivan, who on several counts has reason to consider himself an enemy of the incumbent officers of Local 30 and an ally of Suda, the charging party. I nonetheless consider Sullivan's testimony to be credible.

There is another kind of evidence in the record about the qualifications of Local 30's members: the testimony of roofing contractors who employ members of Local 30. That testimony shows that:

1. Many members of Local 30 do possess the skills, knowledge and experience needed for full qualification as journeyman commercial roofers. But some undetermined number of the members of Local 30 in this category have not changed employers in years and thus hardly ever have occasion to use the Local 30 hiring halls.

2. Some substantial number of members of Local 30 are qualified in many, but not all, respects. For example, a roofer in this group might be expert at built-up roofing but not single-ply roofing (or vice versa) and/or might not know how to operate some of the more specialized commercial roofing equipment.

3. Some members of Local 30 do not consistently produce competent work or, if they do, they do not consistently work fast enough to meet the needs of roofing contractors.

4. Some members of Local 30 are not competent roofers.

What that testimony does not tell us, even roughly, is what percentage of the Local 30 membership falls into each of these categories.

D. *The Qualifications As Commercial Roofers Of Local 30B's Members*

As noted earlier and as will be further discussed below, many members of the RMHA (the employers association with which Local 30B contracted) perform only residential roofing. Thus the likelihood is that at least some of Local 30B's members are experienced only, or primarily, in residential roofing work. I do not consider

such roofers to be qualified for most kinds of jobs available through the Local 30 halls. The questions to be considered here are how many 30B members have commercial roofing experience and, of those 30B members with commercial experience, to what extent are they qualified journeyman commercial roofers.

The record contains four kinds of evidence in these respects: testimony of officials of six roofing contractors that routinely employ 30B members on commercial roofing work (and RMHA records showing the total hours that such contractors employed 30B members); evidence concerning the nature of the now-defunct 30B apprenticeship program; testimony concerning the extent to which RMHA members, as a group, handle commercial work; evidence concerning the occasional use of 30B members by contractors that ordinarily use only members of Local 30; and testimony of roofing contractors concerning the qualifications as commercial roofers of 30B members.

Turning first to the testimony of officials of roofing contractors that routinely employ 30B members, a half-dozen testified about the nature of their work during the period relevant to this proceeding. One (Donnelly) testified that 50 percent of the work of his company that was performed by 30B members work was residential, the rest commercial. The other such witnesses testified that virtually all of the work of their 30B employees was on commercial roofs (ranging from 90% in two cases to more than 98% in two others).

The testimony of those six roofing contractors, together with various statistics of record, show that, together, those six companies employed the equivalent of more than 100 members of Local 30B per year on commercial roof work each year between 1987 and 1990.[7] And those com-

[7] The record provides information on the 30B industry fund contributions that those companies made during those years. Those figures yield the approximate number of hours those companies employed 30B roofers. And other data in the record show that, on

panies are by no means the only roofing contractors that extensively employ 30B roofers on commercial roofing work.[8]

It is clear from the testimony of the officers of those companies, moreover, that the kinds of commercial work performed by such 30B employees was comparable—in terms of types of roofs and their complexities—to the work performed by members of Local 30.

As for the evidence relating to the 30B apprenticeship program, it shows that that program was aimed almost entirely at producing commercial roofers.

As for the evidence about the work of RMHA members as a group, one roofing contractor who had been a director of the RMHA stated, in the course of cross-examination by the Union's counsel, that the "overwhelming majority" of the roofing contractors that had a contract relationship with Local 30B handled residential roofing work exclusively. I credit that testimony. But the record is clear that roofing contractors that do only residential work tend to be very small businesses with few employees, and that the members of the RMHA that do commercial work exclusively, or nearly exclusively, are the largest members of that association. Thus more relevant would be the hours worked by 30B members on commercial roofs compared to total hours worked by 30B members.

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the average, roofers work about 1,000 hours per year. To get roofer man-years, I applied the percentage figures referred to above (to get commercial hours) to the total yearly 30B hours of the six companies, and then divided by 1,000.

[8] According to the credible testimony of witness McGarvey, commercial roofing constitutes "a large majority" of the business of the following RMHA roofing contractors: McMullen Roofing; Reilley Roofing; Rise Roofing; and Delta Roofing. McGarvey's list did not purport to be a complete catalog of RMHA companies that install mostly commercial roofing.

The executive director of the RMHA, Joseph Spitzer, testified about that relationship. He estimated that more 60 percent of 30B hours were performed on commercial roofs. I credit that testimony, although I recognize that inherent in it is a significant margin of error. I thus find that more than half of the roofing hours worked by the Union's 30B members were spent on commercial work. (The Union objected to that Spitzer's testimony in that regard. But, as discussed at the hearing, the issue is not whether the correct figure for commercial 30B hours relative to total hour 30B hours is 60 percent or, say, 57 percent. All that is needed here is a rough approximation. And Spitzer was a credible witness with decades-long employment by the RMHA in a capacity that kept him in frequent communication with the association's member companies. Moreover Spitzer's testimony squares with considerable other evidence about the large amount of commercial work being done by 30B members.[9] And the Union presented no evidence that rebuts the accuracy of Spitzer's testimony. I note also that Spitzer's 60-percent testimony is comparable in nature to the "overwhelming majority" testimony elicited by the Union concerning the proportion of 30B roofiing contractors that perform only residential work, which testimony I also have credited. I further note that my conclusions about the Union's violations of the Act and the remedies such violations warrant would be the same whether commercial work constituted only one-fourth of all 30B work—surely too low a figure—or more than half.)

It is also noteworthy that at least some RSMCA members that perform commercial roofing work exclusively

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[9] For example, when counsel for the General Counsel asked Suda to estimate "what percentage of the time . . . during your career under Local 30B contract . . . was spent on commercial flat roofs and what percentage on residential single-family flat roofs," Suda responded: "I would say the commercial roofing was 70%." That estimate, in turn, was consistent with Suda's lengthy testimony about his work for numerous named roofing contractors.

and whose work force generally is made up entirely of members of Local 30 will from time to time employ 30B members. Very occasionally such 30B employment is for shingling work (a task that Local 30 members are not qualified to handle). But much more frequently such 30B work is on typical commercial roofs. (The use of 30B roofers by RSMCA members is further discussed in Part IV, infra.)

Using Spitzer's 60 percent figure for the moment, does that mean that all 30B members spend 60 percent of their time on commercial work? Or that 60 percent of 30B's members spend all of their time on commercial work while the other 40 percent of 30B members perform only residential roofing? Or is some combination of the two the case? Clearly the third alternative is the correct one. But the record does not permit a breakdown beyond that. Nonetheless, it is evident that a substantial percentage of the Union's 30B members have considerable commercial roofing experience. Still, the question that remains is what is the range of competency at commercial roofing work of the 30B members as a group.

A witness who had recently been employed by a large roofing contractor that permanently employs both Local 30 crews and 30B crews testified that the contractor's 30B crews were not as productive as its best Local 30 crews but better than its worst Local 30 crews. Thus the 30B crews "rated somewhere in the middle of the pack." [10]

The head of an RMHA roofing contractor that permanently employs 30B members and that occasionally uses Local 30 roofers obtained from the Local 30 hiring halls credibly testified that its 30B employees are far superior (as commercial roofers) to the Local 30 employees it employed. (One must be cautious when generalizing from such testimony. As a roofing contractor hits slack periods, its management tends to keep the best em-

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[10] General Counsel witness Ober.

ployees and lay off the rest. After several cycles, the contractor ought to have assembled a very superior group of employees for its permanent staff. Thus an RSMCA roofing contractor that permanently employs members of Local 30 and that occasionally uses 30B roofers obtained from the 30B hiring halls testified that the 30B roofers were unsatisfactory employees. Still, the experience of that RMHA company makes plain that some 30B members are far more qualified as commercial roofers than the run-of-the-mill member of Local 30.)

All of the evidence about the qualifications of 30B members as commercial roofers points in this same direction. As is the case with the members of Local 30: some 30B members are exceedingly well qualified commercial roofers; some are only partially qualified; some are not competent commercial roofers; and the record does not tell us what percentage of the 30B membership falls into each of these categories. It is evident, nonetheless, that some substantial number of 30B members are competent commercial roofers.

I referred earlier to waterproofing work. The RSMCA's members do perform waterproofing. Concomitantly, a fully qualified member of Local 30 ought to be familiar with waterproofing. Thus the subject is taught, albeit briefly, in the Local 30 apprentice program. Local 30B's members apparently only rarely do any waterproofing work. But as touched on earlier, waterproofing amounts to only a small percentage of the RSMCA's work, and the record compels the conclusion that inexperience at waterproofing work does not render an otherwise qualified employee unqualified to seek referrals from Local 30 hiring halls.

IV. A Note On The Nature Of The Union's Defense

Throughout the hearing, and then again on brief, the Union urged that what is involved here is, on the one hand, a union of commercial roofing specialists (Local

30) and, on the other, one of residential roofers (30B). True, because of information gained in the course of the hearing (so a Union representative said), the Union now recognizes that there are a few 30B members who are qualified to work on commercial roofs. But apart from those few exceptions, the Union contends, the Local 30/commercial versus Local 30B/residential dichotomy remains.

But even ignoring the testimony about 60 percent of the 30B hours being on commercial roofs, the uncontroverted testimony of contractors that were parties to the RMHA-30B contract (and related statistics) shows that a substantial proportion of the work of RMHA members and, therefore, 30B members, is commercial roofing work.

Additionally, the Union's leadership had to have known of the nature of the now-defunct 30B apprenticeship program. And that program was directed almost exclusively at teaching commercial roofing techniques.

But let us ignore even those kinds of evidence and consider just this:

In the mid-1980's the then head of Local 30, business manager Steve Traitz, Jr., called the members of the RMHA (that is, the employers who employ 30B members) to a meeting. In that meeting Traitz invited those contractors to be aggressive in competing for *commercial* roofing contracts being bid on by non-union contractors.

About the same time (January 1986), Traitz called a meeting of the RSMCA members. As an official of the RSCMA testified, "the essence" of Traitz's speech to the RSCMA members "was to encourage Local 30 contractors to start 30B operations to begin to compete against non-union competition in the outlying areas of the Union's territory." In other words, if, because of non-union competition, an RSCMA member needed lower labor costs to win a commercial roofing contract, the

company could, with the Union's blessing, employ 30B roofers at 30B wage rates. Out of that speech grew an elaborate system—still in place—whereby members of the RSCMA apply to the Union for the right to use 30B members on commercial roofing work (always at 30B rates) where non-union competition may preclude the employment of members of Local 30 (at Local 30 wage rates). As a result, it is altogether routine for RSCMA roofing contractors to employ 30B members whom they obtain via 30B hiring halls.

We thus have a situation in which the Union's leadership has, for years, followed a policy of urging both RSCMA members and RMHA members to employ members of Local 30B on commercial work whenever competitive circumstances preclude the use of members of Local 30 and in which, on a day-in-day-out basis, the Union's officers act pursuant to the system that was created to implement such policy.

In the very least these circumstances call into question the authenticity of the astonishment that the Union voiced at the hearing about the news that some 30B members are competent commercial roofers.

More importantly they further demonstrate that the Union's refusal to permit any 30B members to use the Local 30 hiring halls has little if anything to do with various justifications put forth by Union representatives during the course of this proceeding—justifications like the contention that 30B members should not be referred out to commercial jobs because such 30B members, being inexperienced at commercial work, would be a danger to themselves and those working with them.

V. The Effect On The Local 30B Members Of The Union's Discrimination Against Them

Local 30B member David Suda applied for job referral from a Local 30 hall in June 1989. As far the

record here indicates, that was the only time any 30B member ever applied for a referral from a Local 30 hall even though, as already discussed: Local 30 jobs pay substantially more than do 30B jobs; and the likelihood is that many 30B members are qualified for Local 30 work.

The question is why only one 30B member has been willing to take that step.

The most obvious answer is that, as discussed earlier, the Union has made it known that 30B members are not permitted to use the Local 30 halls. And, indeed, I conclude that, prima facie, 30B members qualified for Local 30 work would have applied for work at the Local 30 halls had the Union not communicated the message that the Local 30 halls were off-limits to 30B members.

The Union argues, in response, that the only 30B members who are qualified as commercial roofers already have good jobs (albeit at 30B pay rates) as members of the permanent staffs of roofing contractors. The reason they have not used the Local 30 hiring halls, this argument continues, is that they prefer their present positions. But the argument is spurious for two reasons. The first is that it is wholly speculative. It would have been a simple matter for the Union to have called some of those 30B members to the witness stand in order to determine whether the hypothesis was accurate. The Union chose not to do that. The second is that, as the discussion in Part III shows, I do not agree with the Union that the only 30B roofers qualified to do commercial work are those on the permanent staffs of roofing contractors.

I need go no further to conclude, as I do, that it has been the Union's discrimination that has caused the 30B members not to seek work through the Local 30 hiring halls.

But there are two sets of facts not yet discussed that are worth some attention in this respect.

One has to do with Suda's entry in the Philadelphia Local 30 hall in June 1989. As will be discussed in the next part of this decision, that effort on Suda's part resulted in his being told that in no event would he be referred out of the Local 30 hall, being cursed at and otherwise verbally attacked, getting punched, and getting pushed out of the hall. It is altogether unlikely that that episode went unnoticed among the 30B membership, and it alone would explain the absence of 30B members in the Local 30 hiring halls since June 1989.

The second set of facts are those set out in a decision by District Judge Louis C. Bechtle in a civil RICO action against Local 30 and 13 individuals, all of whom were either officers or employees of Local 30. *United States v. Local 30, United Slate, Tile and Composition Roofers,* 686 F. Supp. 1139 (E.D. Pa. 1988), aff'd, 871 F.2d 401 (3d Cir. 1989), cert. den. 110 S. Ct. 363 (1989).[11]

Judge Bechtle found that on numerous occasions in the 20-year period 1968 through 1987, members of Local 30, or persons operating on their behalf:

> —firebombed and otherwise violently destroyed the property of roofing contractors who, for one reason or another, had disagreements with the Union. On one occasion the destruction was effected via the massed efforts of about 1,000 men.

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[11] I thus am giving collateral estoppel effect to Judge Bechtle's decision. At the hearing I asked for the parties' views about the appropriate use to be made of that decision. The General Counsel noted that the Union opted to include Judge Bechtle's decree in the record in this proceeding as Union Exh. 1, which decree specifies that it was entered in accordance with "the court's Findings of Fact and Conclusions of Law. . . ." And the General Counsel's brief assumes that I may rely on Judge Bechtle's findings. But otherwise the parties did not respond to my inquiry.

—savagely beat individuals associated with such companies (sometimes their owners, sometimes their employees), on occasion with rocks, clubs, axes, and/or monkey wrenches. The injuries resulting from such beatings, included broken facial bones, broken ribs, punctured eardrums, and permanent neurological damage.

—threatened disfavored roofing contractors and employees with death and/or grave physical injury and with destruction of their property.

The Union's membership often made it clear that it supported these methods of persuasion. For instance:

—the Union paid for and installed a plaque at the Union hall that honored eleven members convicted of destroying a non-union contractor's property.

—when union members were convicted and imprisoned for some of the above activities, the Union made payments to them and/or their families during their periods of incarceration.

—the Union's membership voted to allow some of the union's business agents accused of such conduct to keep their union-supplied automobiles "if trial goes against them."

Based on the facts outlined above, along with many others spelled out in his decision, Judge Bechtle found that—

> many members of the Union as well as many contractors and subcontractors . . . fear attending meetings at the Union Hall. Their fear is that if they go to the Union Hall to resolve a dispute or problem or to negotiate a contract they will be outnumbered, intimidated, threatened with physical violence and/or physically beaten.
>
> . . . The court finds that such fear is actual, legitimate, and well-founded.

> . . . Such fear stems from, *inter alia,* (1) the undemocratic and brutal policies and practices of the former officers of the Union; (2) the perception that at least some of the former officers are still running the Union;[12] (3) the failure of the newly elected officials and appointed business agents to repudiate the physically violent and otherwise coercive policies and practices of the Union's corrupt former officers; and (4) in some cases, the permanent physical and mental scars of outnumbered persons who suffered physical beating at the hands of hired goons and trained boxers at the Union Hall.

None of the violence described by Judge Bechtle stemmed from hiring hall incidents. But recall Judge Bechtle's finding that—

> many members of the Union . . . fear . . . that if they go to the Union Hall to resolve a dispute or problem . . . they will be outnumbered, intimidated, threatened with physical violence and/or physically beaten.

All of the violence described by Judge Bechtle occurred prior to the time period of concern to us here, and, even taking into account the treatment of Suda at the Local 30 hiring hall, I make no finding that the Union continued, in the years after 1987, to consider violence to be an acceptable way of gaining its objectives.

On the other hand, Judge Bechtle found that the Union officers who took office in 1987 had close ties to the ex-officers who had been convicted of numerous crimes.[13] Most of the officers who were elected in 1987 remain the Union's officers.

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[12] In this regard, see Part VIII, infra, regarding the power of ex-Union head Steve Traitz well after he had left Union office and had been convicted of numerous felonies.

[13] See, *e.g.*, footnote 17, infra.

Given the Union's past predilection for using axes, monkey wrenches and the like on persons who did not heed the wishes of the Union's officers, given the close relationship between many of the current officers of the Union and the persons whom Judge Bechtle found to have so violently violated the law, and given the Union's message to the effect that 30B members are not to use the Local 30 halls, it is no surprise—to say the least—that 30B members have stayed away from the Local 30 halls.

Part VI. David Suda's Attempt to Use A Local 30 Hall

Suda began working as a roofer in 1973 and has been a journeyman member of Local 30B since 1979. In keeping with the way things are done at the Union, until June 29, 1989, whenever Suda sought a job referral through the Union's hiring halls, he used the 30B hiring halls. But on that day, in an act of stunning courage, Suda walked into the Local 30 hiring hall in Philadelphia, approached the hall's dispatcher, Thomas Hamilton, and asked to to sign the work list.

Hamilton initially refused to allow Suda to do so, telling Suda to use the 30B hall. When Suda insisted, Hamilton did allow Suda to sign the list. But Hamilton stated to Suda that whether or not Suda's name was on the list, Suda was not going to be referred out of the Local 30 hall to a job.

Hamilton did not inquire into Suda's qualifications as a commercial roofer. He did not ask Suda about his job history. Rather, the only fact that he focused on was that Suda was a member of 30B, not of Local 30.

Notwithstanding Hamilton's statements to him, Suda remained in the Local 30 hiring hall, sitting quietly.

About a half hour later Union business agent Thomas Lowry arrived at the hall and saw Suda, whom Lowry knew to be a 30B member and a political opponent of the

Union officers to whom Lowry owed allegiance. Lowry's response was to stride rapidly over to where Suda was sitting, stop within two or three feet of Suda, and in an expletive-filled shout, order Suda to get out of the Local 30 hiring hall and to "go back ot 30B where you belong."

Suda snarled back that he had as much right to be there as anyone else and that if Lowry wanted him out of the hall Lowry would have to put him out. Suda then jumped to his feet, bumping into Lowry (because Lowry had placed himself so close to Suda). Suda's response was as filled with expletives as Lowry's had been.

A short-lived fight began. As usual in such circumstances, it is impossible to be sure exactly what happened next. But based on my evaluation of the witnesses and of the record as a whole, the likelihood is that Lowry, reacting to the bump from Suda and to Suda's words and tone of voice, socked Suda in the jaw, hard. Suda responded by tackling Lowry, and the two crashed against a wall, then onto the floor, where they continued to fight.

The other men in the room (who were there awaiting job referrals) quickly stepped in and separated Suda and Lowry. At that point, with the fight stopped, Union vice president Conway, who had been in the Union's office (the next room) stepped over to Suda and told Suda to get out of the Local 30 hall and that job referrals were available to Suda out of the 30B hall. Conway interspersed those words with expletives.

The episode at the hall ended with Lowry and Conway, and perhaps others, pushing Suda out of the Local 30 hall.[14]

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[14] The Union does not deny that Lowry and Conway are its agents. The Union does claim that Hamilton was not an agent of the Union and that in Lowry's altercation with Suda, Lowry was not acting in his capacity as an agent. I do not consider the Union's contention regarding Lowry to be a serious one. As for Hamilton, the Union placed him in immediate charge of the process

The Union presented a half-dozen reasons why it's agent's behavior toward Suda was justified.

One contention of the Union is that it was Suda who started the fight, not Lowry, so that it was appropriate to throw Suda out of the hall. But I have found that it was Lowry who started the fight. First, by rushing at Suda while loudly voicing the (unlawful) demand that Suda leave the Local 30 hiring hall. And second, by punching Suda.

Second, the Union argues that Suda's motivation for entering the Local 30 hall was to cause trouble, not to obtain a job. The Union points out, in this respect, that Suda had run for union office and that he had just learned (through a ballot-count on June 28) that he and the other candidates on his slate had lost. But Suda's motivation for asking for a job referral is irrelevant to the question of whether the Union could lawfully refuse Suda access to the Local 30 hiring hall. Considering Suda's motivation anyway, the probability is that Suda sought a job referral from the Local 30 hall not because he expected to get one; rather, his intent was to make evident (and thus amenable to proof at a hearing) what the Union's members already knew—that the Union had a policy of not permitting its 30B members to use the Local 30 hall. That motive on Suda's part, however, is hardly one that the Board should condemn.

The Union's other claims concerning the response of its agents toward Suda at the hiring hall are that Suda did not present his qualifications to Hamilton when Suda asked to sign the job referral list, that Suda is not qualified as a commercial journeyman roofer, and that Suda's job history shows him to be an unsatisfactory employee.

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by which job applicants signed in. As such, the Union cannot escape responsibility for statements made by Hamilton to a job applicant, Suda, as Suda was signing in and that related to the signing-in process.

But neither Hamilton nor Lowry nor Conway asked Suda for proof of his qualifications or said that Suda would not be referred out because of his lack of knowledge of or experience at commercial roofing or referred to Suda's job history. Rather, the record is utterly clear that their sole reason for refusing Suda access to Local 30 jobs and ordering Suda to leave the hiring hall was that Suda is a member of the Union's 30B side rather than its Local 30 side and, possibly (in Lowry's case), that Suda was a political opponent of the Union's incumbent officers.

I nonetheless will consider the substance of the Union's contentions in these respects.

As far as Suda not submitting qualifications to Hamilton, as indicated earlier, the General Counsel proved that Hamilton did not ask Suda for evidence of his qualifications. And the Union has not proved that the way that Suda checked in at the hiring hall was any different from any other of the job applicants.

As for Suda's qualifications as a commercial roofer, his testimony in this proceeding, and that of several other witnesses, shows that Suda is an expert commercial roofer.

Finally, there is the matter of whether Suda's job history shows him to be an unsatisfactory employee. The record does show that, while Suda is an expert, hard-working employee, he insists on doing things his way. When Suda's way is different from that of his employer, conflicts result. A consequence of that is that Suda tends not to remain in any company's employ for a long time. But that does not add up to a record that makes Suda unemployable. And the Union has not shown that it has a practice of refusing to refer out of the hiring hall employees with records comparable to Suda's.

I conclude that the Union refused to give Suda access to the Local 30 exclusive hiring hall in Philadelphia solely

because Suda is a member of 30B and not of Local 30. The Union thereby violated Section 8(b)(1)(A) and (2). *Teamsters Local 293*, supra; *Teamsters Local 519*, supra; *Plumbers Local 198*, supra.

In addition, Lowry's assault on Suda separately constitutes a violation of Section 8(b)(1)(A)—whether the reason for the assault was solely because Suda was seeking a job referral out of the Local 30 hiring hall or because, in addition, Suda was a political opponent of the Union's leadership.

Part VII. The Union's Imposition Of A Fine On Suda

Suda's attempt to gain a job referral from the Local 30 hall, and the ensuing fight, occurred on June 29, 1989. On the following day, June 30, a political ally of Suda's, Local 30 member Michael Sullivan, sent a letter to the Union charging that the actions of Hamilton, Conway and Lowry violated the Union's constitution and bylaws in various respects.

On July 18 Lowry filed intra-Union charges against Suda, claiming that Suda attacked Lowry and that Suda's attack was "totally unjustified and made without any cause whatsoever."

The Union's recording secretary responded to both sets of charges by setting August 29 as the date of a hearing before the Union's trial board.

Suda did not appear at the intra-Union hearing. Nor did anyone on his behalf. (At the hearing in this proceeding Suda testified that he was afraid that, had he appeared before the trial board, he would have been attacked. I credit that testimony.)

Lowry, and others on Lowry's behalf, did appear at the intra-Union hearing. And on September 15 the trial board issued its decision. The trial board concluded that Suda's charges had to be dismissed, since there was no evidence

to support them, and that Lowry's charges had been proven. Specifically, the trial board found that "Brother Suda instigated the altercation with Brother Lowry and that Brother Lowry did not engage in physical assault upon Brother Suda, but rather was attacked by Brother Suda." The trial board went on to impose a $1,000 fine on Suda.[15]

The General Counsel claims, and I agree, that by imposing that court-collectible fine on Suda, the Union violated Section 8(b)(1)(A).

My conclusion in this respect hinges on Lowry's intra-union charge. For it is clear that a union violates the Act if its agent files an intra-union charge against a fellow union member where a basis of that charge is activity by that fellow union member that is protected by the Act. E.g., *United Mine Workers of America*, 299 NLRB No. 47 (Aug. 8, 1990), rev'd on other grounds, —— F.2d —— (4th Cir. Feb. 26, 1992)

I will assume, for purposes of this part of the decision, that Lowry could honestly believe: that in telling Suda to leave the hiring hall, Lowry spoke in modulated, non-aggressive tones (as Lowry testified at the hearing in this proceeding); and that it was Suda, not Lowry, who struck the first blow. But it is undisputed, even by Lowry, that it was Lowry who approached Suda, not the other way around; that Lowry did so in his role as business agent; and that Lowry told Suda that Suda belonged in the 30B hiring hall, not the Local 30 hall.

Under these circumstances, it is evident—notwithstanding the pro-Lowry assumptions—that the Lowry-Suda incident occurred only because Lowry, an agent of the Union, told Suda to leave the Local 30 hiring hall, thereby violating Suda's Section 7 rights.

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[15] Suda appealed to the International from the trial board's decision, paying a deposit of $250 pending disposition of the appeal. The International has not acted on Suda's appeal.

Thereafter Lowry filed his charge against Suda, claiming that, as noted above, Suda's attack was "totally unjustified and made without any cause whatsoever." The resulting trial board ruling referred to Suda's attack on Lowry, said nothing about Lowry's violation of Suda's Section 7 rights, and imposed a hefty fine on Suda.

The net effect of the Union's action clearly was to restrain and coerce employees in the exercise of their Section 7 rights, and thus violate 8(b)(1)(A). Indeed, any intra-union action that purported to be an investigation into the Lowry-Suda incident and that did not explicitly notify Suda that Lowry, as an agent of the Union, was wrong in telling Suda to leave the Local 30 hiring hall and that did not assure Suda of his right to use the Local 30 hiring hall for job referral purposes, would be a violation of 8(b)(1)(A). That's because any ruling that did not do so would inevitably restrain Suda and similarly situated employees from seeking employment through the Local 30 hiring halls.

I need not reach the question of whether, had the trial board assured Suda of his right to use the Local 30 hall, the trial board could have lawfully disciplined Suda for what it found to be Suda's assault on Lowry.

Part VIII. Local 30's Role In Ace/Tri-County's Discharge of Suda [16]

A. The Facts

When the circumstances that are about to be discussed began, the employer whose actions we are concerned with was named Tri-County Roofing. But Ace Roofing & Sheet Metal purchased Tri-County's assets in December

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[16] The events under consideration here occurred prior to Suda's attempt to obtain employment at the Local 30 hiring hall in Philadelphia. I have presented the events out of chronological sequence in the hope that the facts presented in this order may be somewhat easier for the reader to follow than a strictly chronological version.

1988. Because Ace and Tri-County admit that they are alter egos of one another, there is no need to identify which acts were undertaken by Tri-County, which by Ace. I accordingly will refer to "Ace/Tri-County."

Ace/Tri-County has long been a party to collective-bargaining agreements with Local 30. In August 1988 Suda was hired by Ace/Tri-County, notwithstanding the fact that Suda is a 30B journeyman. Late in December the Union ordered Suda to leave the employ of Ace/Tri-County. A few days later Ace/Tri-County laid off Suda and has never recalled him. The General Counsel contends, and I agree, that the Union's demand that Suda leave Ace/Tri-County was unlawful, that it was the Union's demand that Suda leave Ace/Tri-County that caused that employer to lay off, and not recall, Suda; and that Ace/Tri-County thereby violated Section 8(a)(3) and (1).

John Traitz is an Ace/Tri-County foreman and an admitted supervisor. His wife is a part-owner of the company. As we shall see, Suda's stint at Ace/Tri-County is connected to the fact that John's brother is Steve Traitz, Jr.

Until 1987 Steve was the business manager of Local 30 and, therefore, its chief executive. (See Part IV, supra, for further reference to Steve Traitz.) But in November 1987 Steve was convicted of an array of crimes [17] and was sentenced to, inter alia, 15 years imprisonment. In December 1987 Joseph Crosley succeeded Steve as business manager. Crosley remains in that position.

In August 1988 an altercation erupted between John's side of the family and Steve's. Steve responded by telling John that John's roofing business was about to come

[17] Soliciting kickbacks, embezzlement from an employee benefit plan and from the union's prepaid legal services fund, bribery of public officials, extortion, collecting unlawful debts for an organized crime family, mail fraud, and a RICO violation.

to an end. Sure enough, notwithstanding the fact that Steve no longer held any position with the Union, and notwithstanding the fact that Steve was a convicted felon, most of Ace/Tri-County's roofing crew forthwith left Ace/Tri-County's employ. Moreover the company was unable to obtain replacements through the Union's hiring halls.

In the 1987 election Local 30 member Michael Sullivan had unsuccessfully sought union office at the head of a slate opposed to the Joseph Crosley slate. John Traitz, who was desperate for roofing employees for his company, heard about Sullivan and asked Sullivan for help in providing Ace/Tri-County with roofers. (Henceforth my references to "Traitz" will be to John Traitz.) Suda had supported Sullivan. Sullivan got in touch with Suda and three other roofers, all four of whom went to work for Ace/Tri-County early in September 1988. (Suda was the only 30B journeyman of the four. The other three held Local 30 books. Ace/Tri-County knew of Suda's 30B membership.) The Union's hiring halls, of course, were not used to effect the employment.

In November 1988 Ace/Tri-County laid off the three roofers who had came to the company when Suda did. The reason for their lay-off: The three were, in Traitz's view, incompetent, and work had slowed for the company. Suda continued in the company's employ.

But about that same time a member of the Union filed intra-Union charges against Suda. The charges focused on the fact that Suda obtained employment at Ace/Tri-County without going through Local 30's hiring hall. Suda told Traitz about the charges and also told another of the company's supervisors, Tom Cinagila. Traitz told Suda not to worry about the charges, that he (Traitz), not the Union, did the hiring and firing at Ace/Tri-County.

A Union trial board held a hearing in the matter on November 21, at which Suda testified. On December 29 the trial board issued its decision, ruling that Suda vio-

lated Union requirements by, as a 30B journeyman, taking a Local 30 job and by obtaining the job other than through the Union:

> as a member of Local 30B, Brother Suda had no right to solicit or obtain his own employment on a Roofers Local 30 job. The effect of his actions was to deprive members of Roofers Local 30 of an employment opportunity. . . .

In the future, the decision continued, Suda "must comply with the distinction between Roofers Local 30 and Roofers Local 30B and must also comply with the provisions of the collective-bargaining agreement requiring members to use the Union's hiring hall." Suda was fined $200.00.

Ace/Tri-County laid off Suda a day or two after the trial board handed down its decision.

There is no doubt that the trial board decision was a reason for Ace/Tri-County's termination of its employment of Suda.

When Suda received the trial board's decision in the mail (on the last day or so of December or early in January), he telephoned Cinaglia (the Ace/Tri-County supervisor), told Cinaglia what the trial board had ordered, and asked Cinaglia, "what are we going to do?" Cinaglia responded, essentially, that: Ace/Tri-County has "got to go by the [Union's] decision"; Suda would thus have to cease doing commercial roofing for the company; while the company might perhaps have a little shingling work for Suda (as noted earlier in this decision, the Union considers shingling to be 30B work), Suda had better go back to the 30B hiring hall for a job referral; and Cinaglia would call Suda back with more information. But neither Cinaglia nor anyone else from the company ever again contacted Suda or responded to Suda's calls to the company.

It should be noted that Cinaglia is a member of Local 30 and is entirely familiar with the Union's practice of

precluding 30B members from using the Local 30 hiring halls.

The question is whether Ace/Tri-County would have terminated Suda even had the Union not ordered Suda to leave Ace/Tri-County's employ.

John Traitz testified that he was the one who decided to lay off Suda and that he made that decision solely for two work-related reasons. One, said Traitz, was that the company was entering a slow period. The other reason, Traitz testified, had to do with Suda's attitude—Suda simply would not follow certain types of orders.

I conclude that Ace/Tri-County failed to prove that it would have terminated Suda's employment even absent the Union's demand that Suda leave Ace/Tri-County.[18]

Turning first to the amount of work needed to be done at Ace/Tri-County, winter does tend to be a slow time for roofing contractors, and Ace/Tri-County's records show that the number of hours worked by its roofing employees fell to a low point the week that Suda was terminated. But the company failed to call as a witness the only member of its management knowledgeable about what projects Ace/Tri-County had scheduled at the time Suda was terminated. Beyond that, within days after Ace/Tri-County terminated Suda, it began to hire new employees. (Ace/Tri-County and the Union had just reached a rapprochment and the Union was once again making its Local 30 hiring halls available to Ace/Tri-County.) The company made no attempt to show that it had reason to believe that all of those new employees could handle the available work better than Suda could.

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[18] Regarding burden of proof issues, see *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. den. 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

As for Suda's attitude, it is clear that, as noted earlier, Suda likes to do things his way, rather than his foreman's —that sometimes, indeed, Suda virtually insists on doing things his way. In particular, Suda repeatedly squabbled with his foremen at Ace/Tri-County over the fact that Suda refused to wear gloves even though the roofing material that Ace/Tri-County uses (a kind of asphalt) is heated to nearly 500 degrees Fahrenheit. On the other hand, Suda is a smart, knowledgeable, and experienced roofer who works hard and fast. The record specifically shows that Traitz knew that Suda "really hustle[d]" as a Ace/Tri-County employee. Recall, moreover, that as of the end of December 1988, Suda had been with Ace/Tri-County for abount four months. And the record fails to show that Suda's attitude changed for the worse just before it laid him off.

Suda appealed to the Roofers Union International from the trial board's decision. On March 1, 1989, the International overturned the trial board's imposition of a fine.

B. Conclusion—Local 30's Role In Ace/Tri-County's Discharge of Suda

The Union violated the Act in two obvious respects. The first was in ordering Suda to comply with an unlawful prohibition—that 30B members may not take Local 30 jobs. The second was in ordering Suda to comply with exclusive hiring hall requirements in circumstances in which the hiring hall was being operated unlawfully.

Did the Union cause Suda to lose his job with Ace/Tri-County? The Union argues that it did not, pointing to the absence of any evidence of communications by the Union to Ace/Tri-County regarding Suda. But the Union wanted Suda to leave his job with Ace/Tri-County and, in fact, ordered him to do so. Had Suda left pursuant to that order, the Board would hold the Union responsible for his departure: *Iron Workers Local 111 (Steel*

Builders), 274 NLRB 742 1985; *Sachs Electric Co.*, 248 NLRB 669 (1980). The Union can hardly be deemed less responsible where the employee, predictably concerned about the Union's order, discusses it with his employer who then fires the employee.

As for Ace/Tri-County, it terminated Suda's employment in order to avoid what its management perceived would otherwise be a conflict with the Union. Since Ace/Tri-County knew, or had reason to know, that the Union's demand that Suda leave Ace/Tri-County was an unlawful one, Ace/Tri-County thereby violated Section 8(a)(3) and (1). *Wolf Trap Foundation*, 287 NLRB 1040 (1988); *DuBose Masonry, Inc.*, 279 NLRB 909 (1986).

Local 30 and Ace/Tri-County are accordingly jointly and severally liable for Ace/Tri-County's discriminatory discharge of Suda. E.g., *Wolf Trap Foundation*, supra.

Part IX. The Absence of Objective Standards For Referral From The Hiring Hall

The Union deems all members of Local 30 to have qualifications necessary to be referred from the Local 30 hiring hall. The Union also apparently deems any journeyman member of another Roofers local union (not including 30B) to be qualified. And any participant in the Local 30 apprenticeship program is eligible to referred out of the hall (to apprentice positions, of course), whether or not the participant is a member of the Union.

But the Union maintains no standards by which any other roofer might qualify for referral from any Local 30 hiring hall. There is no real dispute about that. For example, here is yet another exchange between counsel for the General Counsel and Union vice-president Conway:

> Q. Mr. Conway, it is true, is it not, that there is no mechanism by which a Local 30B member can demonstrate his or her qualifications to work on com-

mercial jobs so as to be able to get referrals out of the Local 30 hiring hall?

A. Not at the present there isn't.

Q. And there hasn't ever been during the time that you have been involved?

A. Not to my knowledge.

As discussed earlier, since December 1988 the Union has maintained a 5,000-hour standard for acquiring journeyman membership in the Union. But that is a standard for qualifying for membership in the Union, not for referral from Local 30 halls. That is apparent from the language of the Union executive board resolution that created the 5,000-hour rule:

> Regardless of previous practices and without any exceptions, 5000 hours will be required for consideration to receive a union book in both unions [i.e., Local 30 and 30B].

(As discussed in the previous parts of this decision, a 30B book entitles the holder to use only the 30B hiring halls, not the Local 30 halls.)

Local 30's president, Thomas Pedrick, did testify that the Union would use the 5,000-hour rule as a way of qualifying 30B members to use the Local 30 hiring halls. But: (1) the resolution does not say that; (2) no 30B member has ever been qualified via that route for a Local 30 job; and (3) as just indicated, Conway's testimony shows that there is "no mech nism by which a Local 30B member can demonstrate his or her qualifications to work on commercial jobs so as to be able to get referrals out of the Local 30 hiring hall." In any case, even taking Pedrick's testimony at face value, the standard would hardly be objective. That testimony shows that while all hours worked by members of Local 30 automatically go toward the 5,000-hour requirement, the Union presumes that 30B hours involve residential work, not commercial. So any 30B members wanting

access to the Local 30 halls would have to carry a "burden of proof," as Pedrick put it, in order to convince the Union that they had spent their roofing hours on commercial work.

In sum, it appears that the Union has no objective standards whatever for determining eligibility for referral from the Local 30 hall (except for the aforesaid membership in Local 30, membership in other Roofers locals (not including 30B), and participation in the Local 30 apprenticeship program).

This lack of objective standards constitutes a violation of Section 8(b)(1)(A) and (2):

> In considering whether an exclusive hiring hall is operated in an arbitrary manner, the absence of written rules, although not alone determinative, is evidence of the unfairness of the system . . . . But the absence of any standards, written or otherwise, normally will result in a violation of 8(b)(1)(A) and (2) of the Act for it establishes a breach of the Union's duty of fair representation which causes an employer to discriminate against referral applicants. *Longshoremen ILA Local 1426 (Wilmington Shipping Co.)*, 294 NLRB 1152, 1156 (1989).

The only real issue, in this respect, is whether the matter has been litigated. The complaint does not specifically address the Union's lack of hiring hall standards in those paragraphs alleging violations of the Act.[19] And

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[19] The only arguably relevant allegation (in Paragraph 13 of the complaint) reads:

> Since on or about September 20, 1988, and continuing to the present time, the Respondent Union has conditioned referral of employees for employment as commercial roofers or residential roofers to employer-members of the RSMCA or RMHA, respectively, on the membership status of the employees in the Respondent Union and on arbitrary and discriminatory considerations.

while the General Counsel did frequently refer to this lack of standards throughout the hearing, and on brief, the thrust of those references was to show that the Union discriminates against its 30B members in the operation of its Local 30 hiring halls (as I have found to be the case).

But the complaint not only alleges violations of the Act; it also proposes remedies for those violations. And one of those remedies is that the Union be required to "maintain and operate the exclusive job referral system in a nondiscriminatory manner *based on objective standards and criteria.*" (Emphasis added.)

In view of the repeated discussion during the hearing about the lack of criteria and standards for qualifying employees for referral from the Local 30 hiring halls, and in view of the fact that the Union was on notice that the General Counsel would urge, as a remedy, that the Board require the Union to adhere to "objective standards and criteria," I conclude that the Union had ample reason and opportunity to respond to the evidence adduced by the General Counsel concerning the lack of standards and criteria.

X. Other Matters

A. Discrimination Against Non-Union Employees

As discussed above, the record shows that the Union considers only three categories of employees to be eligible for referral out of the Local 30 halls: Local 30 members; participants in the Local 30 apprenticeship program; and members of other Roofers local unions. The General Counsel's effort in this proceeding has been to show that that is so, and to show that, as a result, the Union has discriminated against its 30B members. But that same evidence suggests an additional conclusion: that the Union also discriminates against employees who are not members of any Roofers union. And, needless to say, if the Union has discriminated against non-union employ-

ees in the operation of the Local 30 hiring halls, it has thereby violated Section 8(b)(1)(A) and (2) of the Act. E.g., *International Longshoremen Association, Local 1423*, supra.

A paragraph of the complaint does arguably cover hiring hall discrimination by Local 30 against non-union employees.[20] And the Union has nowhere even hinted that non-union employees have access to the Local 30 hiring halls. But at no time in this proceeding has the General Counsel contended that the Union discriminates against non-union employees in the Local 30 hiring halls, and the General Counsel has not adduced any evidence specifically pointing in that direction.

I accordingly do not consider myself in a position to conclude that the Union has violated the Act by discriminating against non-union employees in the operation of the Local 30 hiring halls.

B. Local 30's Policy Of Not Permitting Members of Local 30B To Work On The Same Crews With Members of Local 30

The installation of commercial roofs is done by crews of roofers. (Commercial roofing crews range in size from five empolyee to 25, with the typical crew made up of between seven and twelve roofers.) It is Local 30's policy not to permit members of Local 30 and 30B to work on the same crew.

Here, again, is counsel for the General Counsel questioning Conway:

> Q. So what you are saying then is, even if Local 30B men were qualified to [work for RSMCA employers], you can't see any way in which the 30B men could be mixed with the 30 crews?
>
> A. None at all.

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[20] See the previous footnote.

The Union has made that policy known to employers with which the Union has contractual relationships. Here, for example, is the testimony of Gary Wolfe, of Wolfe Roofing and Sheetmetal, Inc. (Wolfe Roofing employs both Local 30 and 30B roofers.)

> Q. Now, does the company have a policy regarding mixing Local 30 and Local 30B roofers in the same work crew?
>
> A. The company does not have a policy.
>
> Q. Well, is it something that you do or do not do?
>
> A. We do not mix them.
>
> Q. And, why is that?
>
> A. We've been told not to by representatives from Local 30 and 30B.

A union policy of that nature would appear to be inherently arbitrary, invidious and discriminatory, and would appear necessarily to restrain and coerce employees in the exercise of their Section 7 rights. Again, however, the matter does not seem to me to have been litigated, and thus I am not in a position to conclude that, because of this policy, the Union has violated the Act.

XI. Miscellaneous Union Defenses

A. Laches

Both the Union and Ace/Tri-County raise, in their answers, the defense of laches, citing the 23-month period between the filing of the original unfair labor practice charge and the issuance of a complaint. But "laches do not lie against the General Counsel for negligent delay." *Consolidated Casinos Corporation*, 266 NLRB 988, 992 (1983); accord, *Merril M. Williams*, 265 NLRB 506, 508 (1982).

I have considered, nonetheless, whether, for some reason, either the Union or Ace/Tri-County was prejudiced

by the delay. But no facts showing this to be the case have been either pleaded or proven.

It is true that one of the Union's possible witnesses, Thomas Hamilton (the Local 30 hiring hall dispatcher), died in the interval between the filing of the charge and the hearing herein. But the Union's answer (the same one that raises the laches defense) states that Hamilton died in August 1989, just five months after the original unfair labor practice charge was filed and, in a case as complex as this one, before the hearing could have reasonably been held.

B. The Supervision Of The Union's Hiring Halls By A U.S. District Court

The answers of the Union and Ace/Tri-County also raise as an affirmative defense that the "Union's hiring hall is being operated under the supervision of the United States District Court for the Eastern District of Pennsylvania pursuant to a decree entered by that Court on May 23, 1988, in an action captioned as *United States v. Roofers Local 30. . . .*"

The facts thus pleaded are accurate. In Part V., supra, I discussed at some length the findings of Judge Bechtle in a civil RICO case against, inter alia, Local 30. In that case Judge Bechtle, by decree, imposed a "decreeship" upon the Union and appointed a Chief Court Liaison Officer ("CCLO") to "serve as the principal liaison officer of all provisions of the Decree." In March 1991 the CCLO asked the district court for an order covering the Union's hiring hall referrals. The court ordered a hearing on this proposal for May 29, 1991. (At the Union's urging, I responded to that order of the district court by postponing the hearing in this proceeding.) But that district court hearing was postponed (because the Union changed counsel), and I ordered the hearings in this proceeding to get underway. Thereafter the district court hearings were postponed indefinitely.

Unquestionably there is considerable overlap in the jurisdiction of the Board and of the district court in respect to the matters under consideration in this proceeding, and, also unquestionably, the CCLO has expressed his concern to the district court (pursuant to the decreeship) about many of the matters under consideration here. But it is not apparent to me why that calls for the dismissal of, or even to halt to, this proceeding. Further, the Respondents could have, but (so far as I have been informed) did not, raise this contention with Judge Bechtle.

XII. CONCLUSIONS OF LAW

1. The Respondents Tri-County Roofing, Inc. and Ace Roofing & Sheet Metal, Inc., are alter egos of one another and are employers engaged in commerce within the meaning of the Act.

2. Roofers local unions 30 and 30B together constitute one labor organization.

3. The Union operates exclusive hiring halls by virtue of its collective-bargaining relationship with an association of employers, the RSMCA.

4. By informing David Suda and other members of Local 30B that, solely because they were members of 30B and not of Local 30, they were not permitted to seek job referrals from Local 30 hiring halls, the Union violated Section 8(b)(1)(A) of the Act.

5. By preventing David Suda and other employee-members of Local 30B from obtaining jobs with members of the RSMCA because such employees were members of Local 30B and not of Local 30, the Union violated Section 8(b)(1)(A) and (2) of the Act.

6. By assaulting David Suda, through its agent Thomas Lowry, because Suda sought a job referral from a Local 30 hiring hall, the Union violated Section 8(a)(1)(A) of the Act.

7. By imposing a fine on David Suda in circumstances in which the imposition of that fine coerced and restrained Suda and other members of 30B in respect to seeking job referrals at Local 30 hiring halls, the Union violated Section 8(b)(1)(A) of the Act.

8. By causing the termination of Suda's employment at Ace/Tri-County because Suda was not a member of Local 30 and because Suda did not obtain such employment via Local 30 exclusive hiring halls, which hiring halls were operated in an unlawful manner, the Union violated Section 8(b)(1)(A) and (2).

9. By terminating Suda's employment because of the Union's demand that Suda leave Ace/Tri-County in circumstances in which Ace/Tri-County knew, or had reason to know, that the Union's demand coerced and restrained Suda in the exercise of his Section 7 rights, Ace/Tri-County violated Section 8(a)(3) and (1) of the Act.

10. Each of the foregoing unfair labor practices affected commerce.

Part XIII. Remedying Local 30's Discriminatory Exclusion Of Eligible 30B Members From The Local 30 Hiring Halls

The Union's operation of its Local 30 hiring halls has violated the Act in blatant and wholesale fashion. This part of the decision deals with the difficult questions of how to remedy past wrongs in this respect and what steps would have the best chance of ensuring that such violations cease.

A. Specifying Which 30B Members Should Be Deemed Qualified For Referral From the Local 30 Hiring Halls

The General Counsel urges that the Board order an end to separate hiring halls for Local 30 members and 30B members. Or, in the General Counsel's words, the Board should require the Union to "merge the work re-

ferral lists under the RSMCA and RHMA contracts and maintain only one referral list for all applicants seeking referrals for employment opportunities."

There are two significant problems with the General Counsel's proposal.

One is that there undoubtedly are some 30B members, perhaps many, who are not competent commercial roofers.

A second is that, as far as the record in this proceeding shows, the maintenance of a system providing for two distinct rates of remuneration (one for jobs out of the Local 30 halls, another for jobs out of the 30B halls) has served useful purposes. It is not wholly clear that such a system could be maintained if the Local 30 and 30B lists were merged. In particular the 30/30B system provides the benefits of hiring halls and a pool of skilled labor to employers whose business is such that they might ordinarily have neither. (I refer to roofing contractors operating in areas in which non-union competition is strong.) Similarly, an end to the 30/30B system might mean a net decline in the income of the Union's membership. I note, in these regards, that the record contains no useful testimony about the possible effects of a merger of the Local 30 and 30B lists on the shape and health of the roofing industry in the geographic area in which the Union operates.[21]

I nonetheless am adopting the General Counsel's proposal because so many considerations argue in its favor.

First, the extraordinary facts of this case demand equally extraordinary remedial action by the Board. It is clear that drastic steps are needed to remedy the many

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[21] The RSMCA and RMHA have proposed a plan to Judge Bechtle pursuant to apprentice which "all current voting members of Local 30 and 30B shall be deemed qualified journeyman roofers" (G.C. Exh. 61). But that provision is part of a package that includes terms that the General Counsel does not claim that the Board should, or even could, order.

years of hiring hall discrimination practiced by the Union, particularly in view of the Union's history of violence.

Second, in establishing non-discriminatory standards for qualifying employees for referral from its hiring halls (as the recommended order requires the Union to do), the Union can, and undoubtedly will, do so in a way that categorizes its members for job referral purposes. Thus the problem of referring to RSMCA members roofers who are incompetent to handle commercial roofing tasks will cease just as soon as the Union sees its way to adopting such non-discriminatory standards.

Third, other unions have been able to establish two or more distinct rates of remuneration (depending upon the type of work and/or the extent of non-union competition), without having to resort to a system that discriminates in wholesale fashion against many of their own members.

Fourth, the Union's own past actions make its predictions of doom less than altogether persuasive. In particular: (1) the Union has permitted some wholly inexperienced individuals to become journeyman members of Local 30 and thus eligible for referral from its Local 30 hiring halls; and (2) the Union has itself encouraged both RMHA and RSMCA employers to utilize 30B members for commercial roofing work (in circumstances in which non-union competition precludes the use of Local 30 pay rates).

Fifth, roofing contractors needing 30B roofers for commercial work routinely obtain these roofers via the 30B hiring halls. Nothing in the record indicates that, even though some 30B members may have no commercial experience, any significant problems thereby arise.

Sixth, while such commercial roofing work requires considerable skill and experience, there is also a substantial amount of unskilled and semi-skilled work to do on any commercial roofing project. (Pushing wheelbarrows, cleaning, screwing down pads or insulation, and the like.)

Should the merged hiring hall lists result in an employer getting a roofer who is inexperienced in commerical work, to some extent the employer can deal with it by assigning those kinds of tasks to that roofer.

Seventh, some residential roofing experience is transferable to commercial roofing work.

Eighth, RSMCA members routinely: (1) ask for specific employees when they call a Local 30 hiring hall; (2) advise the hiring halls that they will not accept certain Local 30 members; and (3) promptly fire any members of Local 30 the employers determine to be incompetent or otherwise incompatible with their work forces. Each of these procedures ought to enable employers to avoid hardship stemming from unqualified employees being eligible for referral from the Union's hiring halls as a result of a merger of the Local 30 and 30B lists.[22]

Ninth, more than half of the work of the 30B membership is on commercial roofs. Thus it is not as though the General Counsel is proposing to merge a roster of essentially residential roofers with one of commercial roofers.

And tenth, throughout the many months of this proceeding the Union could have put forth a method for consideration by the Board by which its Local 30 hiring halls could be operated non-discriminatorily and which would obviate the General Counsel's entirely appropriate concerns. In fact the Union was invited to do so. But except for Pedrick's obviously discriminatory 5,000-hour proposal,[23] the Union merely dragged its heels.

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[22] A possible cause for concern, in fact, is that RSMCA members often obtain employees from the Local 30 hiring halls by having their foremen select from among those employees awaiting job referrals at the halls. Particularly since such foremen are often members of Local 30, that procedure could result in a continuation of the discriminatory treatment of 30B members even after merger of the Local 30 and 30B lists.

[23] See Part IX, supra.

B. Other Forward-Looking Affirmative Remedies Regarding Operation Of The Local 30 Hiring Halls

The General Counsel proposes that the Union be required to maintain and operate its exclusive hiring hall system in a non-discriminatory manner based on objective criteria and standards. In view of the Union's violation of the Act in this respect, that requirement is plainly an appropriate one. To it I will add the requirement that such criteria and standards be written and that upon their adoption they be posted in all of the Union's Local 30 hiring halls and that copies be mailed to the Union's 30B members and provided to the Regional Director for Region 4 and to the Chief Court Liaison Officer appointed pursuant to the decreeship discussed in Part XI (B), supra. (I am recommending that the hiring hall standards and criteria be mailed to the 30B members because of my concern that the Union's hiring hall discrimination against its 30B members has become so institutionalized that special steps are needed to make it clear to those members that things have changed. I am also concerned that some 30B members may be reluctant to visit any Union facilities.)

The Union also will be required to:

(1) Maintain written records of its referrals from its Local 30 hiring halls for two years, with such records containing information sufficient to disclose the basis of referrals. The recommended order requires the Union to make documents available to the Regional Director and to the Chief Court Liaison Officer upon the request of either.

(2) Submit four quarterly reports to the Regional Director, due 10 days after the close of each calendar quarter subsequent to the issuance of this decision, with copies to the Chief Court Liaison Officer, concerning referrals of 30B members to employers that are members of the RSMCA; such reports shall include the dates and num-

bers of applications made by 30B members in Local 30 hiring halls.

(3) Place the referral lists in conspicuous places within the Local 30 hiring halls for easy access and inspection by all applicants seeking referrals for employment opportunities.

C. Back Pay

The likelihood is that, for Suda and other 30B members, the Union's many years of hiring hall discrimination resulted in losses in pay. The General Counsel proposes, in this regard, that the back pay period be limited to the period beginning September 20, 1988, which is six months prior to the filing of the first unfair labor practice charge in this proceeding. That, of course, is appropriate. The General Counsel also proposes that the Board require the Union to make whole Suda and all other employee-members of 30B that have experience in performing commercial roofing work for the losses suffered by reason of discrimination against them.[24] But if the General Counsel is thereby proposing that, for back pay purposes, any 30B member with commercial roofing experience be deemed to be eligible for referral from Local 30 halls, that standard is too broad. On the other hand, if the General Counsel means to leave to the compliance stage the determination of eligibility for referral, that would seem to burden that stage unnecessarily.

I thus recommend that, for the period beginning September 20, 1988, the Union be required to make whole David Suda and the below-listed other employee-members

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[24] The General Counsel argues that back pay should be accorded not only 30B journeymen but, in addition, 30B helpers for whom field dues have been deducted. But the record fails to prove that such 30B helpers would have been entitled to seek job referrals from the Local 30 hiring halls even had the Union not discriminated against its 30B side. I accordingly limit backpay to those 30B journeymen described below.

of Local 30B for the loss of earnings and other benefits they may have suffered by reason of the Union's discriminatory operation of its Local 30 hiring halls. Such loss of earnings shall be computed on a quarterly basis, less any net interim earnings, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Any employee-member of Local 30B having, at the time of the claimed loss:

At least 5,000 hours of roofing experience and who graduated from the 30B apprentice program; or

A total of at least 5,000 hours of roofing experience with one or more of the following companies:

—Delta Roofing

—McGarvey & Sons

—McMullen Roofing

—Reilley Roofing

—Rise Roofing

—R. J. Associates

—Rys Roofing Company

—U.S. Roofing/J.M. Contractors

—Wolfe Roofing & Sheetmetal, Inc.

—Any member of the RSMCA

—Any other employer whose commercial roofing work constitutes more than half of its total roofing work, measured in employee-hours; or

At least 5,000 hours of commercial roofing experience.

My reason for recommending these criteria are—

5,000 hours and graduation from the 30B apprenticeship program: Reference to the 30B apprenticeship pro-

gram reflects the twin facts that the program was designed to produce commercial roofers and that almost all of the participants in that program were employed by companies engaged in commercial roofing work. The 5,000 hour requirement reflects the Union's own standard and evidence that, apprenticeship or no, on-the-job experience is important in becoming a competent roofer.

5,000 hours' experience with the listed employers. The record shows that at least the majority of the roofing work of all of the named employers is commercial work. And, of course, virtually all of the roofing work of the RSMCA members is commercial. It is unlikely that an employee could have 5,000 hours experience with such companies and not have the skills of a commercial journeyman roofer. In addition, there are undoubtedly roofing companies other than those named whose work is mostly commercial. The recommended criteria permit an investigation, at the compliance stage, into the identities of such companies.

5,000 hours of commercial roofing experience. The record is clear that 30B members do a substantial amount of commercial roofing work for companies whose business is at least 50 percent residential—John P. Donnelly Roofing Company, for instance.[25] There may be 30B members who are able to show that they performed 5,000 hours of commercial roofing work for such companies. Even under Pedrick's proposed standard, such employees would qualify as journeyman commercial roofers.

XIV. Other Remedial Provisions

A. Suda's Discharge From Ace/Tri-County

Respondent Ace/Tri-County, having unlawfully terminated the employment of its employee David Suda, must offer him reinstatement. Ace/Tri-County and the Union

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[25] See Part III(D), supra.

shall jointly and severally make Suda whole for any loss of earnings and other benefits he suffered by reason of Ace/Tri-County's termination of his employment. Such losses shall be computed on a quarterly basis from the date of the termination of his employment to the date of proper offer of reinstatement by Ace/Tri-County, less any net interim earnings, as prescribed in *F.W. Woolworth Co.*, supra, plus interest as computed in *New Horizons for the Retarded*, supra.

B. The Need For A Broad Form of Remedial Order

The recommended order requires that the Union cease and desist from all of the various violations of the Act I have concluded that it committed. The issue here is whether the Union should further be ordered to cease and desist from violating the Act "in any other manner" rather than the usual "in any like or related manner."

Because the Union has continued to show itself to be unwilling to comply with the requirements of the Act, because the facts discussed in this decision show that the Union has a proclivity to violate the Act,[26] and because the Union "has engaged in such egregious . . . misconduct as to demonstrate a general disregard" for its 30B members' "fundamental statutory rights," I have concluded that a broad form of order is necessary and appropriate. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979); see also *Boilermakers Local 374 (Construction Engineering) v. NLRB*, 284 NLRB 1382 (1987), enfd. 852 F.2d 1353 (D.C. Cir. 1988).

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[26] See *Roofing, Metal & Heating Associates*, 304 NLRB No. 30 (Aug. 20, 1992) for yet another instance of a violation of the Act by the Union.

Order [27]

A. The Respondent Local 30/30B, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association, AFL-CIO, its officers, agents and representatives, shall:

1. Cease and desist from:

(a) Informing employee-members of Local 30B that, because they are members of the Local 30B side of the Union, they are not permitted to seek job referrals from any of the Union's exclusive hiring halls.

(b) Discriminatorily failing to refer any employee-member of Local 30B to jobs available through the Union's exclusive hiring halls.

(c) Assaulting any employee-member of Local 30B because such employee is seeking a job referral from a hiring hall operated by the Union.

(d) Imposing a fine on any employee-member of Local 30B in circumstances in which the imposition of such fine coerces and restrains such member in respect to seeking job referrals through exclusive hiring halls operated by the Union.

(e) Causing the termination of the employment of any employee-member of Local 30B with any employer because that employee-member is not a member of the Local 30 side of the Union.

(f) Unless its exclusive hiring halls are being operated non-discriminatorily in respect to employee-members of Local 30B, causing the termination of any such member with any employer because such member obtained such

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[27] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

employment other than through a hiring hall operated by the Union.

(g) In any other manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Maintain and operate its exclusive hiring halls in a non-discriminatory manner based on written objective criteria and standards.

(b) Post the criteria and standards required in paragraph (a) in all exclusive hiring halls operated by the Union and mail a copy of such criteria and standards to every employee-member of Local 30B.

(c) Provide copies of the criteria and standards required in paragraph (a) to the Regional Director and to the Chief Court Liaison Officer appointed pursuant to the decree of the United States District Court for the Eastern District of Pennsylvania in Civil Action No. 87-7718.

(d) At each of its exclusive hiring halls, maintain only one combined referral list for all members of Local 30/30B; provided that such lists may be subdivided pursuant to the written objective criteria and standards required in paragraph (a).

(e) Place hiring hall referral lists in conspicuous places within the exclusive hiring halls operated by the Union so as to provide for easy access and inspection by all applicants seeking job referrals.

(f) Make David Suda and other employee-members of Local 30B whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner, and in respect to the persons, set forth in Parts XIII(C) and XIV(A) of the decision.

(g) Preserve and, on request, make available to the Board or its agents for examination and copying, all hiring hall records, membership lists, and all other records necessary to determine the amounts due under the terms of this Order.

(h) Maintain, for two years, written records of its referrals from every hiring hall operated by the Union, including information sufficient to disclose the basis of each referral, and make such records available to the Regional Director and to the Chief Court Liaison Officer upon the request of either.

(i) Submit quarterly reports to the Regional Director, with copies to the Chief Court Liaison Officer, concerning referrals of employee-members of Local 30B to employers that are members of the Roofing & Sheet Metal Contractors Association of Philadelphia and Vicinity in the manner set forth in Part XIII(B) of the decision.

(j) Post in each of its hiring halls copies of the attached notice marked "Appendix A."[28] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Union's representative, shall be posted by the Union immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Union to ensure that the notices are not altered, defaced, or covered by any other material.

(k) Mail a copy of Appendix A to every member of Local 30B.

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[28] If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(1) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

B. The Respondents Ace Roofing & Sheet Metal, Inc. and Tri-County Roofing, Inc., their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating the employment of any employee-member of the Local 30B side of Local 30/30B, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association, AFL-CIO, because of a demand by Local 30/30B that such employee leave such employment, in circumstances in which the Respondents Ace and Tri-County know, or have reason to know, that such demand violates the National Labor Relations Act.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer David Suda immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and, jointly and severally with Local 30, make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in Part XIV(A) of the decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessay to determine the amounts due under the terms of this Order.

(c) Remove from its files any reference to the unlawful termination of Suda's employment and notify Suda that this has been done and that the termination will not be used against him in any way.

(d) Post at its facilities copies of the attached notice marked "Appendix B." [29] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the representatives of Ace and Tri-County, shall be posted by Ace and Tri-County immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

Dated at Washington, D.C. May 8, 1992

/s/ Stephen J. Gross
STEPHEN J. GROSS
Administrative Law Judge

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[29] If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX A

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered to post and abide by this notice.

WE WILL NOT tell members of the 30B side of our Union that they are not permitted to seek job referrals from any exclusive hiring hall that we operate.

WE WILL NOT discriminatorily keep any member of Local 30B from using any exclusive hiring hall that we operate.

WE WILL NOT assault any member of Local 30B because such member is seeking a job referral from a hiring hall that we operate.

WE WILL NOT impose fines on members of Local 30B in circumstances in which the imposition of such fines coerces and restrains such members in respect to seeking job referrals through exclusive hiring halls that we operate.

WE WILL NOT force any member of Local 30B to leave a job because that member is not a member of Local 30.

Unless we are operating the Local 30 hiring halls in a way that does not discriminate against Local 30B members, WE WILL NOT force any member of Local 30B to leave a job because that member got the job without going through one of our hiring halls.

WE WILL NOT in any other manner restrain or coerce you in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL maintain and operate our Local 30 hiring halls in a non-discriminatory manner based on written objective criteria and standards.

WE WILL post these criteria and standards in all Local 30 hiring halls and mail a copy of such criteria and standards to every employee-member of Local 30B.

At each of our exclusive hiring halls, WE WILL maintain only one referral list for all of our members, combining the Local 30 and Local 30B lists; except that we may subdivide these lists according to written objective criteria and standards.

WE WILL place hiring hall referral lists in conspicious places within the 30 hiring halls for easy access and inspection by all applicants seeking job referrals.

WE WILL make David Suda and the following other members of Local 30B whole for any loss of earnings and other benefits, with interest, that they may have suffered since September 20, 1988, as a result of the discriminatory way we operated the Local 30 hiring halls—

Any member of Local 30B having, at the time of the claimed loss:

At least 5,000 hours of roofing experience and who graduated from the 30B apprentice program; or

A total of at least 5,000 hours of roofing experience with one or more of the following companies:

—Delta Roofing

—McGarvey & Sons

—McMullen Roofing

—Reilley Roofing

—Rise Roofing

—R. J. Associates

—Rys Roofing Company

—U.S. Roofing/J.M. Contractors

—Wolfe Roofing & Sheetmetal, Inc.

—Any member of the RSMCA

—Any other employer that does mostly commercial roofing work; or

At least 5,000 hours of commercial roofing experience.

WE WILL, jointly and severally with Ace Roofing and Sheet Metal, Inc. and Tri-County Roofing, Inc., make David Suda whole, with interest, for any loss of earnings and other benefits that he suffered as a result of the termination of employment caused by our discrimination against him.

WE WILL maintain written records of referrals from all of our hiring halls for two years, with those records containing information sufficient to disclose the basis of each referral, and we will make those records available to the Regional Director of the National Labor Relations Board's office in Philadelphia and to the Chief Court Liaison Officer appointed by the United states District Court for the Eastern District of Pennsylvania upon the request of either.

WE WILL submit quarterly reports to the Regional Director and to the Chief Court Liaison Officer concerning referrals of employee-members of Local 30B to employers that are members of the Roofing & Sheet Metal Contractors Association of Philadelphia and Vicinity.

Local 30/30B, United Slate, Tile and Composition Roofers, Damp and Water-Proof Workers Association, AFL-CIO

_____

(Labor Organization)

_____ By _____

Date (Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 615 Chestnut Street—7th Floor, Philadelphia, Pennsylvania 19106-4404, (215) 597-7643.

APPENDIX B

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered to post and abide by this notice.

WE WILL NOT terminate the employment of any member of Local 30B, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association, AFL-CIO, because of a demand by Local 30 that such employee leave such employ, in circumstances in which we know, or have reason to know, that such demand violates the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer David Suda immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and, jointly and severally with the Local 30, make him whole, with interest, for any loss of earnings and other benefits suffered as a result of our discrimination against him.

Ace Roofing & Sheet Metal, Inc.

_____
(Employer)

_____ _____
Date By (Representative) (Title)

Tri-County Roofing, Inc.

(Employer)

Date By (Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 615 Chestnut Street—7th Floor, Philadelphia, Pennsylvania 19106-4404, (215) 597-7643.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-3148

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

TRI-COUNTY ROOFING, INC. and ACE ROOFING & SHEET METAL, INC.; LOCAL 30, UNITED SLATE, TILE AND COMPOSITION ROOFERS, DAMP AND WATERPROOF WORKERS ASSOCIATION, AFL-CIO,
Respondents

No. 94-3165

TRI-COUNTY ROOFING, INC. and ACE ROOFING & SHEET METAL, INC.; LOCAL 30, UNITED SLATE, TILE AND COMPOSITION ROOFERS, DAMP AND WATERPROOF WORKERS ASSOCIATION, AFL-CIO

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

LOCAL 30, UNITED SLATE, TILE AND COMPOSITION ROOFERS, DAMP AND WATERPROOF WORKERS ASSOCIATION, AFL-CIO,
Petitioner

(Board Nos. 4-CA-17967, 4-CB-5809,
4-CB-5876 & 4-CB-6038)

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*,
BECKER, STAPLETON, MANSMANN,
GREENBERG, HUTCHINSON, SCIRICA, COWEN,
NYGAARD, ALITO, ROTH, LEWIS, McKEE and
SAROKIN, *Circuit Judges*.

The petition for rehearing filed by Local 30, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association, AFL-CIO, in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

/s/ [Illegible]
Circuit Judge

Dated: Mar. 14, 1995

APPENDIX D

NLRB RULES AND REGULATIONS
§§ 102.52-102.59

Backpay Proceedings

Sec. 102.52 Compliance with Board order; notification of compliance determination.

After entry of a Board order directing remedial action, or the entry of a court judgment enforcing such order, the Regional Director shall seek compliance from all persons having obligations thereunder. The Regional Director shall make a compliance determination as appropirate and shall notify the parties of the compliance determination. A charging party adversely affected by a monetary, make-whole, reinstatement, or other compliance determination will be provided, on request,, with a written statement of the basis for that determination.

[As amended at 53 FR 37754, Sept. 28, 1988]

Sec. 102.53 Review by the General Counsel of compliance determination; appeal to the Board of the General Counsel's decision.

(a) The charging party may appeal such determination to the General Counsel in Washington, DC, within 14 days of the written statement of compliance determination provided as set forth in § 102.52. The appeal shall contain a complete statement setting forth the facts and reasons upon which it is based and shall identify with particularity the error claimed in the Regional Director's determination. The charging party shall serve a copy of the appeal on all other parties and on the Regional Director. The General Counsel may for good cause shown extend the time for filing an appeal.

(b) The General Counsel may affirm or modify the determination of the Regional Director, or may take

such other action deemed appropriate, stating the grounds for the decision.

Within 14 days after service of the General Counsel's decision, the charging party may file a decision, the charging party may file a request for review of that decision with the Board in Washington, DC. The request for review shall contain a complete statement of the facts and reasons upon which it is based and shall identify with particularity the error claimed in the General Counsel's decision. A copy of the request for review shall be served on the General Counsel and on the Regional Director.

(d) The Board may affirm or modify the decision of the General Counsel, or make such other disposition of the matter as it deems appropriate. The denial of the request for review will constitute an affirmance of the decision of the General Counsel.

[As amended at 53 FR 37754, Sept. 28, 1988]

Sec. 102.54 Initiation of formal compliance proceedings; issuance of compliance specification and notice of hearing.

(a) If it appears that controversy exists with respect to compliance with an order of the Board which cannot be resolved without a formal proceeding, the Regional Director may issue and serve on all parties a compliance specification in the name of the Board. The specification shall contain or be accompanied by a notice of hearing before an administrative law judge at a place therein fixed and at a time not less than 21 days after the service of the specification.

(b) Whenever the Regional Director deems it necessary in order to effectuate the purposes and policies of the Act or to avoid unnecessary costs or delay, the Regional Director may consolidate with a complaint and notice

of hearing issued pursuant to § 101.15 a compliance specification based on that complaint. After opening of the hearing, consolidation shall be subject to the approval of the Board or the administrative law judge, as appropriate. Issuance of a compliance specification shall not be a prerequisite or bar to Board initiation of proceedings in any administrative or judicial forum which the Board or the Regional Director determines to be appropriate for obtaining compliance with a Board order.

[As amended at 53 FR 37754, Sept. 28, 1988]

Sec. 102.55 Contents of compliance specification.

(a) *Contents of specification with respect to allegations concerning the amount of backpay due.* With respect to allegations concerning the amount of backpay due, the specification shall specifically and in detail show, for each employee, the backpay periods broken down by calendar quarters, the specific figures and basis of computation of gross backpay and interim earnings, the expenses for each quarter, the net backpay due, and any other pertinent information.

(b) *Contents of specification with respect to allegation other than the amount of backpay due.* With respect to allegation other than the amount of backpay due, the specification shall contain a clear and concise description of the respects in which the respondent has failed to comply with a Board or court order, including the remedial acts claimed to be necessary for compliance by the respondent and, where known, the approximate dates, places, and names of the respondent's agents or other representatives describe in the specification.

(c) *Amendments to specification.* After the issuance of the notice of compliance hearings but prior to the opening of the hearing, the Regional Director may amend the specification. After the opening of the hearing, the specification may be amended upon leave of the adminis-

trative law judge or the Board, as the case may be, upon good cause shown.

[As amended at 53 FR 37754, Sept. 28, 1988]

Sec. 102.56. Answer to compliance specification.

(a) *Filing and service of answer; form.* Each respondent alleged in the specification to have compliance obligations shall, within 21 days from the service of the specification, file an original and four copies of an answer thereto with the Regional Director issuing the specification, and shall immediately serve a copy thereof on the other parties. The answer to the specification shall be in writing, the original being signed and sworn to by the respondent or by a duly authorized agent with appropriate power of attorney affixed, and shall contain the mailing address of the respondent.

(b) *Contents of answer to specification.* The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondents' position as to the applicable premises and furnishing the appropriate supporting figures.

(c) *Effect of failure to answer or to plead specifically and in detail to backpay allegation of specification.* If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to specification, find the specification to be true and enter such order as may be appropriate. If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

(d) *Extension of time for filing answer to specification.* Upon the Regional Director's own motion or upon proper cause shown by any respondent, the Regional Director issuing the compliance specification and notice of hearing may by written order extend the time within which the answer to the specification must be filed.

(e) *Amendment to answer.* Following the amendment of the specification by the Regional Director, any respondent affected by the amendment may amend its answer thereto.

[As amended at 53 FR 37754, Sept. 28, 2988]

Sec. 102.57 Extension of date of hearing.

Upon the Regional Director's own motion or upon proper cause shown, the Regional Director issuing the compliance specification and notice of hearing may extend the date of the hearing.

[As amended at 53 FR 37754, Sept. 28, 1988]

Sec. 108.58 Withdrawal

Any compliance specification and notice of hearing may be withdrawn before the hearing by the Regional Director upon his or her own motion.

Sec. 102.59 Hearing; posthearing procedure.

After the issuance of a compliance specification and notice of hearing, the procedures provided in §§ 102.24 to 102.51 shall be followed insofar as applicable.

[As amended at 53 FR 37754, Sept. 28, 1988]

(7)

No. 94-2026

Supreme Court, U.S.
FILED
AUG 18 1995
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

LOCAL 30, UNITED SLATE, TILE AND COMPOSITION ROOFERS, DAMP AND WATERPROOF WORKERS ASSOCIATION, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

FREDERICK L. FEINSTEIN
General Counsel

LINDA SHER
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board
Washington, D.C. 20570

BEST AVAILABLE COPY

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QUESTION PRESENTED

Whether the National Labor Relations Board acted within its discretion in fashioning a class-wide back-pay remedy for petitioner's discriminatory operation of its hiring halls.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-2026

LOCAL 30, UNITED SLATE, TILE AND COMPOSITION ROOFERS, DAMP AND WATERPROOF WORKERS ASSOCIATION, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a-3a) is not reported. The decision and order of the National Labor Relations Board (Pet. App. 4a-17a) and the decision of the administrative law judge (Pet. App. 18a-82a) are reported at 311 N.L.R.B. 1368.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1995. A petition for rehearing was denied on March 14, 1995. Pet. App. 83a-84a. The petition for a writ of certiorari was filed on June 12, 1995.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, Local 30, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association, AFL-CIO (Union), represents employees working in the roofing trades in the Philadelphia, Pennsylvania metropolitan area. Pet. App. 20a. While the Union actually consists of two "sides," known as "Local 30" and "Local 30B," both sides constitute a single labor organization for purposes of the National Labor Relations Act (Act), 29 U.S.C. 151 *et seq.* Pet. App. 21a. The Union operates a number of hiring halls within its geographic jurisdiction; however, the Union treats each hiring hall as though it were two different halls, one "side" for use by members of Local 30, and the other "side" for use by members of Local 30B. *Ibid.*

All of the hiring halls used by members of Local 30 were exclusive hiring halls by virtue of a labor contract between the Union and an employer association known as the Roofing & Sheet Metal Contractors Association of Philadelphia and Vicinity (RSMCA), whose members were engaged exclusively in the installation of commercial roofs. Pet. App. 21a, 26a. The Union enforced a blanket policy of prohibiting members of Local 30B from seeking employment referrals through the Local 30 "side" of the Union's hiring halls. *Id.* at 23a. As a result, members of Local 30B were unable to obtain referrals to commercial roofing jobs covered by the RSMCA contract. Such commercial roofing jobs paid substantially more in wages and benefits than jobs covered by a separate labor contract between Local 30B and another roofing

contractors association known as the Roofing, Metal & Heating Associates (RMHA). *Id.* at 22a & n.3, 23a.

Before June 1989, no member of Local 30B had ever attempted to challenge the Union's policy of refusing to allow members of Local 30B to seek referrals from the Local 30 hiring halls. However, on June 19, 1989, Local 30B member David Suda, with what the administrative law judge (ALJ) described as "stunning courage," walked into the Local 30 hiring hall in Philadelphia and asked the dispatcher, Thomas Hamilton, to allow him to sign the work list. Pet. App. 38a-39a, 43a. Hamilton initially refused, telling Suda to "use the [Local] 30B hall." *Id.* at 43a.[1] When Suda insisted, Hamilton allowed him to sign the work list, but told him that he would not be referred to a job from the Local 30 hiring hall. *Ibid.* Hamilton never asked Suda about his job qualifications or work history. *Ibid.* About thirty minutes later, while Suda was sitting quietly waiting for a referral, the Union's business agent approached Suda, and, in an expletive-filled shout, ordered him to get out of the Local 30 hiring hall and "go back to 30B where you belong." *Id.* at 43a-44a. A skirmish ensued, during which the business agent punched Suda in the jaw. *Id.* at 44a. Suda was then physically ejected from the hiring hall by the business agent and the Union's vice-president. *Ibid.*

2. a. Suda filed unfair labor practice charges against the Union. In February 1991, the General Counsel of the National Labor Relations Board (Board) issued a complaint alleging, *inter alia*, that the Union violated the Act by conditioning job re-

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[1] In Philadelphia, the Local 30 and Local 30B hiring halls are located in different buildings. Pet. App. 21a.

ferrals from the Local 30 hiring halls upon the employees' membership status within the Union. Pet. App. 19a, 57a n.19.

After a hearing, the ALJ concluded that the Union violated Section 8(b)(1)(A) and (2) of the Act, 29 U.S.C. 158(b)(1)(A) and (2), by preventing Suda and other members of Local 30B from obtaining referrals from Local 30 hiring halls because of their membership in Local 30B. Pet. App. 62a.[2] The ALJ found that "the record is utterly clear that [the Union's] sole reason for refusing Suda access to Local 30 jobs * * * was that Suda is a member of the Union's 30B side rather than its Local 30 side." *Id.* at 46a. The ALJ further found that "the record is clear that the Union's sole basis for refusing to let [Local] 30B members use the Local 30 hiring halls is their membership in [Local] 30B rather than Local 30." *Id.* at 23a. The Union's conduct was unlawful, the ALJ explained, because, under settled law, "[l]ack of membership in a favored union is not an appropriate basis for refusing access to an exclusive hiring hall. * * * Nor may a [u]nion operate a hiring hall in a way that favors one faction of its members over another." *Id.* at 23a-24a.

The ALJ rejected petitioner's contention that its exclusionary policy was lawful because most members of Local 30B were not qualified to perform the

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[2] The ALJ also found that the Union violated Section 8(b)(1)(A) by informing Suda and members of Local 30B that they were not permitted to seek job referrals from Local 30 hiring halls solely because they were members of Local 30B and not Local 30; by assaulting Suda because he sought a job referral from a Local 30 hiring hall; and by imposing a fine on Suda as a result of the altercation at the Local 30 hiring hall; and violated Section 8(b)(1)(A) and (2) by causing an employer to discharge Suda. Pet. App. 62a-63a.

kinds of jobs available through Local 30 hiring halls. Pet. App. 24a. Rather, the ALJ found that, although "[i]t is evident * * * that some substantial number of [Local] 30B members are competent commercial roofers" (*id.* at 36a), "[t]he Union treats as beside the point the [Local] 30B members' qualifications * * *. No matter how well qualified, [Local] 30B members are not permitted to seek work through the Local 30 halls." *Id.* at 23a.[3]

Furthermore, the ALJ found that, although Suda was the first member of Local 30B to attempt to obtain a referral from a Local 30 hiring hall, it was "obvious" that other "[Local] 30B members qualified for Local 30 work would have applied for work at the Local 30 halls had the Union not communicated the message that the Local 30 halls were off-limits to [Local] 30B members." Pet. App. 39a. The ALJ added that "[i]t is altogether unlikely that [the Suda] episode went unnoticed among the [Local] 30B membership, and it alone would explain the absence of [Local] 30B members in the Local 30 hiring halls since June 1989." *Id.* at 40a.

The ALJ also found it significant that, in a prior civil RICO suit brought by the United States against the Union, a federal district court found that, over the 20-year period ending in 1987, the Union and its agents, on numerous occasions, had firebombed the

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[3] Given the ALJ's findings, the Union mischaracterizes the Board's decision in asserting (Pet. 13) that "[t]he Board's Decision clearly determines that the alleged discrimination against Suda was not based on Suda's membership in Local 30B," but rather "was based on the Union's refusal to refer Suda to work * * * notwithstanding his demonstrated qualifications for employment." See also Pet. 20.

property of disfavored roofing contractors, savagely beat individuals associated with those contractors, and engaged in intimidation of its own members. Pet. App. 40a-41a; see *United States* v. *Local 30, United Slate, Tile & Composition Roofers*, 686 F. Supp. 1139 (E.D. Pa. 1988), aff'd, 871 F.2d 401 (3d Cir.), cert. denied, 493 U.S. 953 (1989). In particular, the ALJ pointed out that the district court found that "many members of the Union * * * fear * * * that if they go to the Union Hall to resolve a dispute or problem * * * they will be outnumbered, intimidated, threatened with physical violence and/or physically beaten." Pet. App. 42a.

In light of "the Union's past predilection for using axes, monkey wrenches and the like on persons who did not heed the wishes of the Union's officers," "the close relationship between many of the current officers of the Union and the persons whom [the court] found to have so violently violated the law," and "the Union's message to the effect that [Local] 30B members are not to use the Local 30 halls," the ALJ concluded that "it is no surprise—to say the least—that [Local] 30B members have stayed away from the Local 30 halls." Pet. App. 43a. The ALJ also noted that the court had imposed a "decreeship" on the Union, and had appointed a court liaison officer to monitor the terms of the decree. *Id.* at 61a.

b. The ALJ found that "the extraordinary facts of this case demand equally extraordinary remedial action by the Board," for "[i]t is clear that drastic steps are needed to remedy the many years of hiring hall discrimination practiced by the Union, particularly in view of the Union's history of violence." Pet. App. 64a-65a. The ALJ explained that the scope of the remedy "hinges on the extent to which [Local]

30B members are qualified for commercial work," since "the business of the RSMCA's members is entirely the installation of flat commercial roofs." *Id.* at 25a, 26a. The testimony of Suda and other witnesses established that Suda was "an expert commercial roofer." *Id.* at 46a. However, the ALJ found that the Union maintained no objective standards for determining whether a member of Local 30 who applied for a referral from a Local 30 hiring hall was actually qualified to do commercial roofing work. *Id.* at 55a-57a.[4]

To fashion an appropriate qualification standard for commercial roofing work, the ALJ examined the testimony of roofing contractors and relevant employment records. Pet. App. 32a-36a, 69a-70a. Based on that evidence, the ALJ found that a member of Local 30B should be deemed to have been qualified to per-

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[4] The ALJ found that the Union's failure to maintain objective standards for determining eligibility for referral from Local 30 hiring halls constituted an independent violation of Section 8(b)(1)(A) and (2) of the Act. Pet. App. 57a. In so concluding, the ALJ noted that a rule instituted by the Union in December 1988, "whereby a roofer must have 5,000 hours of commercial roofing experience in order to be admitted to Local 30 membership" (*id.* at 29a-30a), was "a standard for qualifying for membership * * * not for referral from Local 30 halls" (*id.* at 56a). The ALJ rejected the Union's proposal that the Board adopt its 5,000-hour rule as a referral standard; the ALJ found that the manner in which the Union proposed to apply that standard to Local 30B members "would hardly be objective" and was "obviously discriminatory." *Id.* at 56a, 66a. Given the ALJ's findings, the Union mischaracterizes the Board's decision in asserting (Pet. 13-14) that "the Board found that the Union's established criteria for determining commercial journeyman status * * * was [*sic*] lawful." See also Pet. 15.

form commercial roofing work if, at the time of the claimed loss of referral, that member: (1) was a graduate of Local 30B's apprenticeship program and possessed at least 5,000 hours of roofing experience; (2) possessed a total of at least 5,000 hours of roofing experience with one or more specified RMHA contractors, with any RSMCA contractor, or with any other contractor whose commercial roofing work constituted more than half of its total roofing work; or (3) possessed at least 5,000 hours of commercial roofing experience. *Id.* at 69a.[5]

Accordingly, the ALJ ordered the Union, *inter alia*, to make all members of Local 30B who met the foregoing standard (including Suda) whole for any loss of earnings and benefits they may have suffered because of the Union's discriminatory operation of the Local 30 hiring halls, beginning September 20, 1988 (the date six months prior to the date on which Suda filed his unfair labor practice charge). Pet. App. 68a-69a.

3. The Board affirmed the ALJ's findings and conclusions and, modifying the remedial class to include individuals known as "helpers," who were also victims of the Union's discriminatory operation of the Local 30 hiring halls, the Board adopted the ALJ's remedial order. Pet. App. 4a-17a.[6]

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[5] In light of the evidence relied upon by the ALJ, the Union is incorrect in asserting (Pet. 13) that the Board's order is based on "the Board's own subjective criteria for qualification as a commercial journeyman."

[6] "Helpers" are individuals who worked under the Local 30B/RHMA labor contract and paid "field dues," but were not full members of Local 30B. Pet. App. 6a.

4. The court of appeals summarily enforced the Board's order. Pet. App. 1a-3a.

ARGUMENT

The Board correctly found that petitioner committed a "blatant and wholesale" violation of the Act (Pet. App. 63a) by discriminatorily prohibiting the members of Local 30B and the helpers, as a class, from seeking job referrals from Local 30 hiring halls, solely because of their lack of membership in Local 30. Accordingly, the Board also acted within its remedial discretion in ordering petitioner to make whole the class members for any loss of earnings and benefits they may have suffered on account of petitioner's unlawful discrimination. Since job referrals available through Local 30 hiring halls required skilled commercial roofers, the Board acted within its remedial discretion in identifying a reasonable commercial roofing job-qualification standard to guide the Board's determinations of which individuals in the remedial class are entitled to backpay. Because the Board's remedial views "merit the greatest deference," *ABF Freight System, Inc.* v. *NLRB*, 114 S. Ct. 835, 839 (1994), the court of appeals correctly enforced the Board's order. Further review by this Court is therefore not warranted.

1. Petitioner does not challenge the Board's remedial policy (see Pet. 9), nor does it contest the Board's order to the extent that it requires petitioner to make whole discriminatee Suda. Rather, petitioner asserts (Pet. 8-14) that the Board abused its discretion insofar as it extended a backpay remedy to any other member of Local 30B. There is no merit to that contention. In *Heavy & Highway Construction Workers' Local Union No. 158 (Contractors' Ass'n of*

Eastern Pennsylvania), 280 N.L.R.B. 1100, 1101 (1986), enforced mem., 865 F.2d 251 (3d Cir. 1988) (Table), the Board explained that, in cases involving the unlawful operation of an exclusive hiring hall, it is the Board's established policy "to order[] remedial relief to unnamed individuals similarly situated to discriminatees" where, as here, the Board finds that there is "sufficient evidence to establish widespread discrimination against a defined and easily identified class." As the Board noted, "[c]ommon to these cases is the fact that unnamed discriminatees [can] be easily identified by a single, readily ascertainable, and definitive trait, most often the absence of membership in a particular labor organization." *Ibid.*[7]

Petitioner argues (Pet. 10) that the Board should not have granted a remedy to the unnamed members of Local 30B since they do not share a "single, readily ascertainable, and definitive trait" with discriminatee Suda under *Heavy & Highway Construction Workers' Local 158*, *supra*. Although Suda and the unnamed individuals were all members of Local 30B, petitioner contends (Pet. 10) that "the Board did not rely on such status, alone, as a basis for back pay liability. Rather, the Board established a class predicated upon various permutations of experience."

Petitioner, however, mischaracterizes the Board's decision. The Board found that petitioner violated the Act by prohibiting Suda and his fellow members of Local 30B from seeking job referrals through Local

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[7] See, *e.g.*, *International Ass'n of Bridge, Structural & Ornamental Ironworkers, Local 45*, 232 N.L.R.B. 520, 521 (1977); *International Ass'n of Bridge, Structural & Ornamental Ironworkers, Local 480*, 235 N.L.R.B. 1511, 1514 (1978), enforced mem., 598 F.2d 611 (3d Cir. 1979) (Table).

30 hiring halls because they were not members of Local 30, and for no other reason. Pet. App. 62a. Accordingly, it was proper for the Board to extend remedial relief to the class of unnamed members of Local 30B, for they, like Suda, suffered discrimination solely on account of their shared "absence of membership in a particular labor organization." *Heavy & Highway Construction Workers' Local 158*, 280 N.L.R.B. at 1101. The commercial roofing job-qualification standard fashioned by the Board is irrelevant to defining the class of discriminatees; rather, that standard bears only upon the identification of those members of that class who are actually entitled to an award of backpay, an issue to be resolved in a future compliance proceeding. See *International Brotherhood of Boilermakers, Local 101 (Stearns-Rogers Corp.)*, 206 N.L.R.B. 30, 30 n.3, 40-41 (1973); *International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 433 (The Associated General Contractors of California, Inc.)*, 228 N.L.R.B. 1420, 1440-1441 (1977), enforced, 600 F.2d 770 (9th Cir. 1979), cert. denied, 445 U.S. 915 (1980).

Second, petitioner argues (Pet. 10-12) that, because "[t]here is a substantial lack of evidence that the Union discriminated against any person other than Suda," the Board was required by its precedents to limit any relief in this case to Suda alone. The facts as found by the Board and sustained by the court of appeals, however, reflect discrimination against the class. Petitioner "communicated the message that the Local 30 halls were off-limits to [Local] 30B members" (Pet. App. 39a); it reinforced that message by physically ejecting Suda from the Local 30 hall in Philadelphia when he attempted to challenge petitioner's unlawful policy (*id.* at 43a-47a); and it

instilled in the members of Local 30B "[the] fear * * * that if they go to the Union Hall * * * they will be outnumbered, intimidated, threatened with physical violence and/or physically beaten" (*id.* at 42a). See discussion at pp. 5-6, *supra*. The fact-bound (and not very plausible) assertion that Suda was the only victim of petitioner's unfair labor practices raises no issue warranting review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

Third, petitioner contends (Pet. 12), incorrectly, that, under Board precedent, "[t]he *sine qua non* for imposing any liability beyond Suda * * * should have been an attempt by other Local 30B members to seek referral from Local 30, coupled with specific evidence of their qualification for such referral." Under the NLRA, victims of discriminatory hiring hall practices are not required to engage in futile acts in order to preserve their entitlement to a remedy for the union's unlawful conduct. See *Teamsters Local Union No. 293 (Beverage Distributors, Inc.)*, 302 N.L.R.B. 403, 407 (1991), enforced, 959 F.2d 236 (6th Cir. 1992) (Table); *Local Union 948, International Brotherhood of Electrical Workers*, 253 N.L.R.B. 656, 658 (1980), enforced, 697 F.2d 113 (6th Cir. 1982). The ALJ found (Pet. App. 39a) that "[Local] 30B members qualified for Local 30 work would have applied for work at the Local 30 halls had the Union not communicated the message that the Local 30 halls were off-limits to [Local] 30B members." Suda's experience confirmed that any effort by a Local 30B member to obtain a job referral or to demonstrate his or her job qualifications at a Local 30 hall would have been pointless, and perhaps even dangerous. Pet. App. 23a, 43a-47a. Class members were not legally

required to engage in such futile acts in order to be eligible for relief.

2. Petitioner also contends (Pet. 18) that the Board's remedial order is punitive and "could render the Union bankrupt," and that it therefore fails to effectuate the purposes of the Act. Until the Board has completed compliance proceedings to determine which members, if any, in the remedial class are entitled to backpay and how much is due them, petitioner's claim of financial hardship is both speculative and premature. See *Esmark, Inc.* v. *NLRB*, 887 F.2d 739, 760 n.37 (7th Cir. 1989); *NLRB* v. *International Longshoremen's & Warehousemen's Union, Local No. 13*, 549 F.2d 1346, 1355 (9th Cir.), cert. denied, 434 U.S. 922 (1977).[8]

3. Finally, petitioner contends (Pet. 21) that the Board violated "fundamental concepts of due process" because, it asserts, the Board failed during the hearing process to "announce that it would consider a 'class' type remedy * * * or in any manner alert [the Union] to the potential scope of the remedy it was considering, until *after* the Board's Decision was issued." See also Pet. 22-23. Petitioner did not raise that claim below, and therefore waived it. *Neely* v.

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[8] The Union further suggests (Pet. 21-22) that, under the Board's procedural rules that govern compliance proceedings, the Union will be unable to offer, and the Board will not consider, evidence that "the Board's remedy may financially destroy the Union." That claim is meritless, for the Board has made clear that a party "has an opportunity to show current hardship as cause for modification of the remedy at the compliance stage." *Coronet Foods, Inc.* v. *NLRB*, 981 F.2d 1284, 1288 (D.C. Cir. 1993).

Martin K. Eby Construction Co., 386 U.S. 317, 330 (1967).

In any event, petitioner's claim is based on a mischaracterization of the record. In the unfair labor practice complaint, the General Counsel put petitioner on notice that he was seeking "an Order requiring the Respondent Union to, *inter alia*, * * * make whole David Suda *and all employee-members of Local 30B [who] have experience in performing commercial roofing work*." 1 C.A. App. 1016 (emphasis added). The General Counsel pressed his request for class-wide relief before the ALJ (Pet. App. 68a) who, after a hearing and the submission of briefs by all parties, ordered a remedy for the class (*id.* at 69a-70a). Although petitioner's exceptions to the ALJ's order included an objection to its class-wide scope, the Board rejected that objection and adopted the ALJ's order in all relevant respects. The record thus shows that the Board afforded petitioner full notice and the opportunity to be heard with respect to the scope of the remedy in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FREDERICK L. FEINSTEIN
General Counsel

LINDA SHER
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board

AUGUST 1995